DOCKET

No. 08-1214

Title:	Granite Rock Company, Petitioner v. International Brotherhood of Teamsters, et al.
Docketed:	April 1, 2009
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(07-15040, 07-16142, 07-16236)
Decision Date:	October 22, 2008
Rehearing Denied:	December 30, 2008

Questions Presented

Date	Proceedings and Orders
Mar 30 2009	Petition for a writ of certiorari filed. (Response due May 1, 2009)
Apr 14 2009	Order extending time to file response to petition to and including May 29, 2009, for all respondents.
Apr 29 2009	Brief amicus curiae of Center on National Labor Policy, Inc. filed.
May 1 2009	Brief amicus curiae of Associated General Contractors of America, Inc. filed.
May 1 2009	Brief amicus curiae of National Association of Manufacturers filed.
May 29 2009	Brief of respondents International Brotherhood of Teamsters, et al. in opposition filed.
May 29 2009	Brief of respondent Teamsters Local 287 in opposition filed.
Jun 8 2009	Reply of petitioner Granite Rock Company filed. (Distributed)
Jun 9 2009	DISTRIBUTED for Conference of June 25, 2009.
Jun 29 2009	Petition GRANTED.
Jul 20 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including August 27, 2009.
Aug 27 2009	Joint appendix filed. (Jt. appendix in two volumes). Statement of costs received.
Aug 27 2009	Brief of petitioner Granite Rock Company filed.
Sep 2 2009	Brief amicus curiae of Associated General Contractors of America, Inc. filed.
Sep 3 2009	Brief amici curiae of Center on National Labor Policy, Inc., et al. filed.
Sep 3 2009	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Sep 16 2009	Joint motion for divided argument filed by respondents.
Sep 17 2009	The time within which to file respondents' briefs on the merits is extended to and including October 26, 2009.
Oct 26 2009	Brief of respondent Teamsters Local 287 filed.
Oct 26 2009	Brief of respondents International Brotherhood of Teamsters filed.
Oct 30 2009	Brief amicus curiae of American Federation of Labor and Congress of Industrial Organizations filed.
Nov 2 2009	SET FOR ARGUMENT ON Tuesday, January 19, 2010.
Nov 2 2009	CIRCULATED.
Nov 9 2009	Motion for divided argument filed by respondents GRANTED.
Nov 25 2009	Reply of petitioner Granite Rock Company filed. (Distributed)
Dec 1 2009	Record received from U.S.C.A. 9th Circuit. (1 envelope)
Dec 8 2009	Record received from U.S.D.C. for the Northern District of California. (1box)
Jan 19 2010	Argued. For petitioner: Garry G. Mathiason, San Francisco, Cal. For respondent

Teamsters Local 287: Robert Bonsall, Sacramento, Cal. For respondent International Brotherhood of Teamsters: Peter D. Nussbaum, San Francisco, Cal.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
081214 MAR 3 0 2009
OFFICE OF THE CLERK

NO.

In The Supreme Court of The United States

GRANITE ROCK COMPANY,

Petitioner,

v.

THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS & TEAMSTERS LOCAL 287,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ARTHUR R. MILLER
Of Counsel
NEW YORK UNIVERSITY SCHOOL OF LAW
40 Washington Square South
Vanderbilt Hall 409D
New York, NY 10012
Telephone: 212.992.8147

GARRY G. MATHIASON
Counsel of Record
ALAN S. LEVINS
ADAM J. PETERS
KIMBERLY L. OWENS
LITTLER MENDELSON
650 California Street,
20th Floor
San Francisco, CA 94108
Telephone: 415.433.1940

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

QUESTIONS PRESENTED FOR REVIEW

1. Does a federal court have jurisdiction to determine whether a collective bargaining agreement was formed when it is disputed whether any binding contract exists, but no party makes an independent challenge to the arbitration clause apart from claiming it is inoperative before the contract is established?

2. Does Section 301(a) of the Labor-Management Relations Act, which generally preempts otherwise available state law causes of action, provide a cause of action against an international union that is not a direct signatory to the collective bargaining agreement, but effectively displaces its signatory local union and causes a strike breaching a collective bargaining agreement for its own benefit?

CORPORATE DISCLOSURE STATEMENT

Granite Rock Company has no parent company, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES viii

PETITION FOR A WRIT OF CERTIORARI 1

Opinion Below 1

Jurisdiction 1

Statutory Provisions Involved 1

STATEMENT OF THE CASE 2

I. Statement Of Facts 2

II. Procedural History 5

A. District Court Proceedings 5

B. The Ninth Circuit Decision 7

REASONS FOR GRANTING THE PETITION 9

I. Supreme Court Review Of The Ninth Circuit's Decision Requiring Arbitration Of Contract Formation Issues Is Essential To Harmonize The Circuits And Prevent Rejection Of Arbitration Agreements 10

A. A Circuit Split Exists Regarding Whether Federal Courts Have Jurisdiction To Determine If A Contract Exists, Even If No Party Separately Challenges The Validity Of The Arbitration Clause 10

B. This Case Involves Arbitrability Principles Of Utmost Importance To Labor Relations In Addition To Commercial Contracts..... 18

II. To Fulfill The Purpose Of Section 301 And Resolve A Longstanding Circuit Split, This Couort Should Review The Ninth Circuit's Decision Providing Immunity To Any International Union That Causes A Labor Contract To Be Violated 21

A. This Court Interprets Section 301(a) Broadly To Enforce Labor Contracts — A Directive That Circuits Interpret Inconsistently 23

B. The Ninth Circuit Decision Directly Conflicts With Decisions From Other Circuits That Recognize Section 301(a) Jurisdiction For Contractual Interference By Non-Signatories 25

C. Reflecting Fundamental Confusion, The Circuits Are Divided About Whether Section 301(a) Ever Provides Jurisdiction For Claims Against Non-Signatories..... 28

D. The Circuits Have Divided On Whether Contractual Interference Claims Arise Under Section 301 Because They Require Determining Whether A Labor Contract Was Violated 32

E. Congress Intended Section 301(a) To Promote Labor Peace, A Matter Of Great National Importance That Is Thwarted If Entities With Power To Influence Signatories, Such As International Unions, Are Immune 34

III. CONCLUSION 37

APPENDIX

Ninth Circuit Court Of Appeals Opinion (10/22/08) A-1

District Court Order Compelling Arbitration (05/17/07) A-20

Jury Verdict (05/03/07) A-22

District Court's Closing Instructions With Stipulated Facts As Exhibit 1 (05/02/07) A-25

District Court Order Denying Labor Union's Motion To Compel Arbitration Of Bifurcated Issue Of Whether The Collective Bargaining Agreement Was Ratified (02/16/07) A-41

District Court Amended Final Judgment And Certificate Of Appealability (01/17/07) A-61

District Court Order Certifying Appeal Pursuant To Rule 54(b) (12/31/06) A-63

District Court's Interlocutory Judgment (10/05/06) A-69

District Court Order Granting Defendant International Brotherhood Of Teamsters' Motion To Dismiss With Prejudice (10/05/06) A-70

District Court Order Granting Defendant's Motion For Partial Summary Judgment And Denying Defendant's Motion To Strike Plaintiff's Jury Demand (11/21/05) A-82

District Court Order Denying Defendant's Motion For Judgment On The Pleadings, Or, In The Alternative, For A Stay Pending Arbitration (07/19/05) A-97

Ninth Circuit Court Of Appeals Order Denying Appellant Granite Rock's Petition for Rehearing En Banc (12/30/08) A-105

29 U.S.C. § 185 ..... A-108

Granite Rock's Third Amended Complaint For Damages (06/08/06) A-110

Tentative Agreement Between Granite Rock Company and Teamsters Local 287 (07/02/04) A-127

Finalized, Executed Collective Bargaining Agreement Between Granite Rock Company and Teamsters Local 287 (Effective 05/01/04 to 04/30/08) A-137

Union Proposal "Back To Work Agreement," (Fax Dated 07/03/04) A-191

TABLE OF AUTHORITIES

Page(s)

Cases

Adams v. Suozzi,
433 F.3d 220 (2d Cir. 2005) 16, 17, 18

Allis-Chalmers v. Lueck,
471 U.S. 202 (1985)..... 9, 24, 32

Am. Fed. of TV & Radio Artists v. WJBK-TV,
164 F.3d 1004 (6th Cir. 1999)..... 31

AT&T Technologies v. Comm. Workers,
475 U.S. 643 (1986).....6, 11, 14, 19

Baylis v. Marriott Corp.,
843 F.2d 658 (2d Cir. 1988) 28

Beatrice/Hunt-Wesson, Inc.,
302 NLRB 224 (1991) 18

Boys Markets, Inc. v. Retail Clerks Union,
398 U.S. 235 (1970)..... 5

Buckeye Check Cashing, Inc. v. Cardegna,
546 U.S. 440 (2006)..... 8, 14

Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.,
690 F.2d 489 (5th Cir. 1982)..... 31, 32

TABLE OF AUTHORITIES - Continued

Page(s)

Chastain v. Robinson-Humphrey Co.,
957 F.2d 851 (11th Cir. 1992)..... 16

Dougherty v. Parsec, Inc.,
872 F.2d 766 (6th Cir. 1989)..... 33

Express Scripts, Inc. v. Aegon Direct Mktg. Servs.,
516 F.3d 695 (8th Cir. 2008)..... 16

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938 (1995)..... 11, 15

Glass v. Kidder Peabody & Co.,
114 F.3d 446 (4th Cir. 1997)..... 17

Granite Rock Co. v. Int'l Bhd. of Teamsters, Local 287,
546 F.3d 1169 (9th Cir. 2008)..... *passim*

Hertz Corp.,
304 NLRB 469 (1991) 18

Howsam v. Dean Witter Reynolds, Inc.,
537 U.S. 79 (2002)..... 11

Int'l Ass'n of Machinists & Aerospace Workers, Progressive Lodge No. 1000 v. Gen. Elec. Co.,
865 F.2d 902 (7th Cir. 1989)..... 19

Int'l Bhd. of Elec. Workers v. Hechler,
481 U.S. 851 (1987)..... 24

TABLE OF AUTHORITIES - Continued

Page(s)

Int'l Union, United Mine Workers v. Covenant Coal Corp.,
977 F.2d 895 (4th Cir. 1992).....25, 26, 28, 31

John Wiley & Sons, Inc. v. Livingston,
376 U.S. 543 (1964)..... 11

Johnson v. Jones,
515 U.S. 304 (1995)..... 3

Large v. Conseco Fin. Servicing Corp.,
292 F.3d 49 (1st Cir. 2002)..... 16, 17

Litton Fin. Printing Div. v. NLRB,
501 U.S. 190 (1991)..... 18

Loss v. Blankenship,
673 F.2d 942 (7th Cir. 1982)..... 30

Marbury v. Madison,
5 U.S. 137 (1803)..... 32

Microchip Tech. Inc. v. U.S. Philips Corp.,
367 F.3d 1350 (Fed. Cir. 2004)..... 14

Milne Employees Ass'n v. Sun Carriers, Inc.,
960 F.2d 1401 (9th Cir. 1992)..... 33, 34

Nedd v. United Mine Workers,
556 F.2d 190 (3d Cir. 1977)..... 26

Page(s)

Oppenheimer & Co., Inc. v. Oppenheim, Appel, Dixon, & Co.,
86 N.Y.2d 685 (1995) 17, 18

Painting & Decorating Contractors Ass'n v. Painters & Decorators Joint Comm.,
707 F.2d 1067 (9th Cir. 1983)..... 28, 31

Pakootas v. Teck Cominco Metls, Ltd.,
452 F.3d 1066, 1069 (9th Cir. 2006)..... 3

Prima Paint Corp. v. Flood & Conklin Mfg. Co.,
388 U.S. 395 (1967)..... 11

Rintin Corp., S.A. v. Domar, Ltd.,
476 F.3d 1254 (11th Cir. 2007)..... 16

Sandvik AB v. Advent Int'l Corp.,
220 F.3d 99 (3d Cir. 2000) 14, 15

Schneider Moving & Storage Co. v. Robbins,
466 U.S. 364 (1984)..... 19

Seawright v. Am. Gen. Fin., Inc.,
507 F.3d 967 (6th Cir. 2007)..... 16

Serv., Hosp., Nursing Home & Pub. Employees Union, Local No. 47 v. Commercial Prop. Servs.,
755 F.2d 499 (6th Cir. 1985)..... 32

Smith v. Evening News Ass'n,
371 U.S. 195 (1962)..... 23

Page(s)

Specht v. Netscape Communs. Corp.,
306 F.3d 17 (2d Cir. 2002) 16

Sphere Drake Ins. Ltd. v. All Am. Ins. Co.,
256 F.3d 587 (7th Cir. 1995)..... 15, 16

Teamsters v. Lucas Flour Co.
369 U.S. 95 (1962)..... 22

Teamsters Nat'l Auto. Transporters Indus. Negotiating Comm. v. Troha,
328 F.3d 325 (7th Cir. 2003)..... 30, 31

Teledyne, Inc. v. Kone Corp.,
892 F.2d 1404 (9th Cir. 1989)..... 13

Textile Workers of Am. v. Lincoln Mills,
353 U.S. 448 (1957)..... 22, 23, 35

Textron Lycoming Reciprocating Engine Div. v. United Auto. Workers,
523 U.S. 653 (1998)..... 23, 24

Three Valleys Municipal Water Dist. v. E.F. Hutton & Co.,
925 F.2d 1136 (9th Cir. 1991)..... 13

United Ass'n of Journeymen & Apprentices v. Ga. Power Co.,
684 F.2d 721 (11th Cir. 1982)..... 26, 27, 33

Page(s)

United Food & Commercial Workers Union, Local No. 1564 v. Quality Plus Stores, Inc.,
961 F.2d 904 (10th Cir. 1992) 24, 29

United Steelworkers Of Am. v. Am. Mfg. Co.,
363 U.S. 564 (1960) 10, 19

United Steelworkers Of Am. v. Enter. Wheel & Car Corp.,
363 U.S. 594 (1960) 10

United Steelworkers Of Am. v. Warrior & Gulf Navigation Co.,
363 U.S. 574 (1960) 10

Va. Carolina Tools, Inc. v. Int'l Tool Supplies, Inc.,
984 F.2d 113 (4th Cir. 1993) 17

Wilkes-Barre Publishing Co. v. Newspaper Guild of Wilkes-Barre, Local 120,
647 F.2d 372 (3d Cir. 1981) 24, 25, 26

Will-Drill Res., Inc. v. Samson Res. Co.,
352 F.3d 211 (5th Cir. 2003) 16

Wooddell v. Int'l Bhd. of Elec. Workers, Local 71,
502 U.S. 93 (1991) 23

Xaros v. U.S. Fidelity & Guarantee Co.,
820 F.2d 1176 (11th Cir. 1987) 27

Page(s)

Statutes

28 U.S.C. § 1254 1
29 U.S.C. § 185 ..... *passim*
45 U.S.C. §§ 151-188 31

Other Publications

Cox, *Reflections Upon Labor Arbitration*,
72 Harv. L. Rev. 1482, 1509 (1959) 19

PETITION FOR A WRIT OF CERTIORARI

Petitioner Granite Rock Company respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The Ninth Circuit opinion, *Granite Rock Company v. International Brotherhood of Teamsters, Local 287*, appears at 546 F.3d 1169 (9th Cir. 2008). The opinions of the District Court regarding arbitration and Section 301 jurisdiction are unreported. Copies of the Ninth Circuit opinion and all relevant District Court orders are in the Appendix.

JURISDICTION

The Ninth Circuit entered its opinion on October 22, 2008. The court denied rehearing *en banc* on December 30, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 301(a) of the Labor-Management Relations Act ("LMRA") provides:

> Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States

> having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a). A complete copy of the statute is appended.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Granite Rock produces concrete and other building materials. Granite Rock has facilities throughout Northern California, employs about 800 employees, and maintains labor contracts with more than fifteen unions. Granite Rock has been in business since 1900. (Appendix ("A.") 37,111-12.)

On July 2, 2004,[1] Granite Rock (also the "Company") and Teamsters Local 287 (the "Union," the "Local," or "Local 287") reached a "tentative agreement" for a successor collective bargaining agreement after an all-night bargaining session. Granite Rock and the Union agreed the proposed contract would only become binding if and when ratified by employees. Local 287 business agent, George Netto, promised to hold a vote later that morning and recommend ratification. The proposed contract contained a no-strike provision[2] and a

---

[1] All dates refer to 2004, unless otherwise stated.

[2] Section 22 of the parties' agreement is entitled "Strikes And Lockouts." It provides:

> There will be no strikes, including unfair labor practice strikes, sympathy strikes, slowdowns, stoppages of work or picketing by the Union or employees and there will be no lockouts by the

provision for arbitrating disputes "arising under" the agreement.[3] (A.38-40,134-35,176-79,181-82.)

On July 2, within hours after negotiations concluded, the Union took down its pickets and held a membership vote. The bargaining unit voted to accept the tentative agreement. Several employees told Granite Rock the agreement was ratified (the "Agreement"), and the strike was over. (A.22,39-40.)

Throughout negotiations, the International Brotherhood of Teamsters (the "IBT" or "International Union") guided Local 287's actions.[4]

> Employer during the term of this Agreement, except as otherwise provided for herein. However, it will not be considered a violation of this Agreement and an employee will not be permanently replaced for refusing to pass through or work behind a lawful primary picket line established at any Employer property by a union, which picket line has been sanctioned by the Joint Council of Teamsters No. 7, and also approved by the Bay Area Building Material Teamsters Committee, after fifteen (15) full working days of both withholding services and primary picketing at the Employer facility. . . .

(A.134-35,181-82.)

[3] Section 20 of the parties' agreement is entitled "Grievance Procedure" and provides, in relevant part: "All disputes arising under this agreement shall be resolved in accordance with the [Grievance] procedure," which includes arbitration as the third step. (A.176-79.)

[4] The District Court dismissed Respondent IBT under FRCP 12(b), ruling as a matter of law. The facts regarding the IBT, as recited below, are from the Third Amended Complaint. (A.110-26.) All allegations in the Complaint must be presumed true and viewed in the light most favorable to Granite Rock. *See, e.g., Johnson v. Jones*, 515 U.S. 304, 313 (1995); *Pakootas v. Teck Cominco Metals, Ltd*, 452 F.3d 1066, 1069 (9th Cir.

IBT agent Rome Aloise provided strategic information to the Local, including a document comparing Teamster bargaining agreements in the region. Aloise also proposed bargaining meetings and stated he had authority to negotiate without the Local's approval. (A.114-15, 117-19.)

The first telephone call Netto made after reaching the Agreement on July 2 was to Aloise. Aloise, acting on behalf of the IBT, instructed Netto that Local 287 must not honor the Agreement unless and until Granite Rock agreed to a hold-harmless side letter to the Agreement. (A.117-22.)

Following Netto's call to Aloise, Local 287 claimed ratification had not occurred. Local 287 announced it would not allow the employees to ratify the contract until Granite Rock entered a separate hold-harmless agreement. Thus, through Local 287, the IBT sought new concessions, demanding the Company hold all local *and international* unions harmless for strike misconduct. At the IBT's direction and inducement, the Union supported its demand by threatening a Company-wide strike.

Granite Rock rejected the demand, expressing its understanding that employees already ratified the Agreement, which contained a no-strike clause. (A.116-19.)

The next day, the IBT and Local 287 began a Company-wide strike, involving numerous facilities, hundreds of employees, and several other Teamster locals. During the strike, IBT agent Aloise

---

2006). Additional facts regarding Local 287 appear in the jury verdict and factual stipulations. (A.22-24,29-30,37-39.)

maintained constant communication with Local 287 and directed its actions. Aloise told Granite Rock he independently had authority to resolve the dispute. Aloise rallied other local Teamster unions to support the strike. The IBT supplied strike benefits to keep Local 287 members on the picket lines and financially supported Local 287 with a $1.2 million ($1,200,000.00) loan.

The IBT was not a signatory to the Agreement. Nonetheless, the IBT caused the subsequent strike and did so to obtain an immunity agreement for its own benefit. The strike occurred during Granite Rock's busiest season, inflicting substantial injury on the Company, its employees, and their families in an amount dramatically exceeding the net worth of the undercapitalized Local Union. (A.119-20.)

II. PROCEDURAL HISTORY

A. District Court Proceedings.

When the IBT/Local 287 strike recommenced after July 2, Granite Rock immediately filed a Complaint in federal court, seeking a "*Boys Market* Injunction" to prevent further damages.[5] Local 287 prevented issuance of an injunction by denying ratification occurred, and thus no binding agreement was formed. The District Court agreed, denying the injunction request and allowing the strike to continue.

---

[5] Under *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970), federal courts may enjoin a strike *if* the dispute over which the strike occurs is arbitrable under a collective bargaining agreement.

Near the end of the strike in September, Granite Rock revived its lawsuit after one Union member came forward with a sworn statement that ratification occurred on July 2. The Company continued the lawsuit, now seeking damages.

Based on initial discovery, the Company added claims against the IBT for causing the strike. (A.124-25.) However, the District Court dismissed the IBT, interpreting Section 301(a) solely as granting jurisdiction for claims against labor contract signatories. The court severed the IBT claim for immediate appeal under Federal Rule of Civil Procedure 54(b). (A.61-81.)

Local 287 continued to claim no contract existed. After the strike ended and an injunction was no longer relevant, however, Local 287 also moved for arbitration. (A.41.) Based on *AT&T Technologies v. Communication Workers*, 475 U.S. 643 (1986), the District Court ruled arbitration was improper without first determining whether any contract existed. The court found that "parties can only be required to submit to arbitration if they agreed to so submit," noting:

> [Local 287's] argument that the dispute is subject to the grievance and arbitration provisions of the contract, rather than court adjudication, is misplaced at this time. The provisions of the contract would only be binding if there was a contract in the first place; yet, Defendant claims the contract was never ratified. . . . ***Defendant cannot avail itself of arbitration while at the same time insisting that the agreement***

> ***was never ratified.*** *. . . [A] material issue of fact remains over the existence of the contract.*

(A.97-104 (emphasis added).)

The District Court ordered a jury trial to determine whether an agreement existed beginning July 2. (A.41-60,82-96.) After six days of trial, the jury unanimously found (1) a vote by bargaining unit employees occurred on July 2; and (2) the employees voted *to accept* the tentative agreement, creating a binding contract. (A.22-23.) Accordingly, at the time the Union resumed its strike for additional concessions, a no-strike agreement existed.

The next steps in the lawsuit would be to determine whether the strike violated the no-strike clause and, if so, calculate the damages. Granite Rock sought to have these issues decided by a jury, but the District Court ruled they were arbitrable. (A.82-96.)

B. The Ninth Circuit Decision.

On October 22, 2008, the Ninth Circuit reversed the District Court ruling that it had jurisdiction to determine whether the agreement *existed* as a prerequisite to arbitration. *Granite Rock Co. v. Int'l Bhd. of Teamsters, Local 287*, 546 F.3d 1169 (9th Cir. 2008).[6] The Ninth Circuit held that federal courts only have jurisdiction to

---

[6] The Ninth Circuit separately affirmed an NLRB order finding Local 287 committed unfair labor practices (Ninth Circuit case numbers 06-72964 and 06-73444). The IBT was not a party to that action.

determine whether a contract exists *if* "*there is a challenge to the arbitration provision which is separate and distinct from any challenge to the underlying contract.*" *Id.* at 1176-77 (quoting *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404, 1410 (9th Cir. 1989)). The court applied *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) for this holding, although this case did not involve a claim of fraud or any other defense alleging an existing contract was void or voidable. *See id.* at 1178.

The Ninth Circuit further held that an arbitration clause covering "[a]ll disputes arising *under*" an agreement "is broad enough to cover [a] dispute over contract *formation*...." *Granite Rock*, 546 F.3d at 1177 (emphasis added). The court concluded whether any contract was formed should have been decided by an arbitrator, rendering the jury verdict moot. The grounds for this holding was that neither party distinctly challenged the arbitration clause.

The Ninth Circuit affirmed dismissal of Granite Rock's Section 301(a) claim against the IBT for contractual interference. Doing so, the Ninth Circuit acknowledged a Circuit split. *Granite Rock*, 546 F.3d at 1174-75 & n.2 (recognizing Third Circuit permits such claims). The court's holding narrows Section 301 jurisdiction, reasoning that no cause of action could exist against the IBT because it had no express rights or duties under the Agreement. *Id.* at 1173-74. Although Granite Rock must prove a breach of the Agreement to prevail against the IBT, the court held any claim would solely amount to "mere reference" to the Agreement, not sufficient for

jurisdiction. *Id.* at 1173. The Ninth Circuit also took issue with the label of "tortious interference" as a viable cause of action under Section 301. *Id.* at 1175. The court acknowledged Section 301 "can be read as a 'congressional mandate to the federal courts to fashion a body of common law to be used to address disputes arising out of labor contracts,'" but declined to do so. *Id.* (quoting *Allis-Chalmers v. Lueck*, 471 U.S. 202, 209 (1985)). The Ninth Circuit opined, "[i]f Congress did not provide a remedy for Granite Rock directly against the IBT on its asserted tortious interference claim, then that is an issue to be addressed by Congress...." *Id.* at 1176.

Granite Rock requested *en banc* review, which the Ninth Circuit denied on December 30, 2008. App., 106-07. (A.106-7.) This petition timely follows.

REASONS FOR GRANTING THE PETITION

Both issues raised in this Petition present factors the Court weighs heavily in deciding whether a case warrants review. Each presents a pronounced Circuit divide. Each presents major changes to the dynamics of labor relations. Moreover, the holding requiring parties to arbitrate contract *formation* challenges will impact *all* contract negotiations in which parties agree they will arbitrate subsequent disputes if a binding contract is reached. This applies to commercial contracts as well as labor contracts. This Court should grant review to reconcile conflicting lower court decisions about threshold arbitrability determinations and the scope of Section 301(a) jurisdiction to prevent labor disputes.

I. SUPREME COURT REVIEW OF THE NINTH CIRCUIT'S DECISION REQUIRING ARBITRATION OF CONTRACT FORMATION ISSUES IS ESSENTIAL TO HARMONIZE THE CIRCUITS AND PREVENT REJECTION OF ARBITRATION AGREEMENTS.

The Ninth Circuit now holds that federal courts must compel arbitration anytime an arbitration agreement appears in a *disputed* contract, *without a prior judicial determination that any binding contract containing an arbitration clause exists.* This decision poses danger for labor relations and all commercial contracts and *directly conflicts* with other Circuits. In an era when arbitration agreements are standard clauses in labor contracts following the *Steelworkers* trilogy,[7] this Court must establish a uniform rule.

A. A Circuit Split Exists Regarding Whether Federal Courts Have Jurisdiction To Determine If A Contract Exists Even If No Party Separately Challenges The Validity Of The Arbitration Clause.

This Court should resolve the current division regarding the boundaries of federal courts determining arbitrability. Over the years, two distinct lines of Supreme Court jurisprudence have emerged. One addresses arbitrability questions that

---

[7] *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 594 (1960).

federal courts decide before compelling arbitration. *See John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964) (whether party is bound by agreement containing arbitration clause is "threshold question" for court); *AT&T Tech. v. Comm. Workers*, 475 U.S. 643, 649 (1986) ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator"); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) (ambiguous issue in contract must not be deferred to arbitration when it concerns arbitrability); *Howsam v. Dean Witter Reynolds*, Inc., 537 U.S. 79 (2002) (distinguishing procedural defenses, such as a statute of limitations, which are arbitrable, from contract formation issues, which may not be deferred to an arbitrator unless parties clearly and unmistakably agree). These cases emphasize that arbitration is a matter of contract, and hold that questions about the *existence* and *scope* of an arbitration agreement must be decided *by courts.*

A second line of Supreme Court jurisprudence addresses whether a court or an arbitrator should decide defenses, such as fraud in the factum or fraud in the inducement, that would render an established contract void or voidable. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006). These cases hold that, because an arbitration agreement is severable, the arbitrator determines the contract's validity (as opposed to its formation), unless one party separately claims the arbitration clause is invalid. *Prima Paint*, 388 U.S. at 402-04; *Buckeye*, 546 U.S. at 449 ("We reaffirm

today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator"). In *Buckeye*, a case addressing a signed contract which one party claimed was void due to illegality, this Court expressly declined to address whether consent is a judicial or arbitral determination, stating:

> The issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded. Our opinion today addresses only the former, and *does not speak to the issue* decided in the cases cited ... which hold that it is for courts to decide whether the alleged obligor ever signed the contract ....

Buckeye, 546 U.S. at 444 n.1 (internal citations omitted, emphasis added). This case presents the Court with an opportunity to directly address these important issues, resolve the entrenched Circuit divide, and harmonize the *AT&T* and *Prima Paint* lines of arbitration cases, which impact both labor and commercial contracts.

With *Granite Rock*, the Ninth Circuit demonstrated it will continue to apply this Court's arbitration decisions in a manner contrary to every other Circuit. *Although Granite Rock never consented to have an arbitrator decide the existence of an agreement*, the court held it was error for the District Court to determine that a binding contract existed before compelling arbitration. The Ninth

Circuit now holds, as a *general rule*, that courts may not decide *any* contract issues, unless a party separately challenges the arbitration clause. Basically, the Ninth Circuit collapses the *AT&T* and *Prima Paint* lines of cases into a single holding, rather than reading them as covering distinct scenarios.

The Ninth Circuit began departing from other federal appellate courts in *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404 (9th Cir. 1989).[8] In *Teledyne*, the defendant argued there was no agreement to arbitrate because the parties never finalized a draft contract containing an arbitration clause. *Id.* at 1410. The Ninth Circuit applied *Prima Paint*, not *AT&T*, and held that a matter must be sent to arbitration "unless there is a challenge to the arbitration provision which is separate and distinct from any challenge to the underlying contract." *Id.*

In this case, the Ninth Circuit held that the *Teledyne* rule is not limited to a narrow set of facts, but applies at all times absent an independent challenge to the arbitration clause. *Granite Rock*, 546 F.3d at 1176-77. The court recognized, "[t]he United States Supreme Court has drawn a distinction between challenges to an arbitration clause and challenges to an entire contract." *Id.* at 1176 (citing *Buckeye*, 546 U.S. at 445-46). However,

---

[8] Before *Granite Rock*, the Ninth Circuit characterized *Teledyne* as a "rare case." *Three Valleys Municipal Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1142 (9th Cir. 1991). The Ninth Circuit's opinion expanded the *Teledyne* holding, applying it, absent an independent challenge to the arbitration clause, "[w]hether the facts of this case and of *Teledyne* are 'rare' or not...." *Granite Rock*, 546 F.3d. at 1177.

the court interpreted *Buckeye* as presenting a "*general rule*" for *all* arbitration cases, without recognizing this Court's statement in *Buckeye* that it was not addressing cases disputing contractual consent. *See* 546 U.S. at 444 n. 1. Applying *Buckeye* to *all* arbitration cases, the Ninth Circuit effectively curtails virtually all federal jurisdiction for arbitrability determinations when no party independently challenges the arbitration clause.

The Federal Circuit has expressly rejected the *Teledyne* rule that was made the "general rule" in this case. *See Microchip Tech. Inc. v. U.S. Philips Corp.*, 367 F.3d 1350, 1358 (Fed. Cir. 2004) (quoting *Teledyne*, 892 F.2d at 1410). That court rejected the rule established in *Granite Rock* as generally applying, explaining: "*Contrary to the Ninth Circuit's decision in Teledyne*, the responsibility of the judiciary to resolve the gateway dispute of whether an agreement to arbitrate exists is not limited to situations in which there is an independent challenge to the arbitration clause." *Id.* (emphasis added). The Federal Circuit held that whether an arbitration agreement exists remains a judicial determination. *Id.*

This issue has matured. Virtually all other Circuits hold that whether a contract *exists* must be resolved *by the court*, not an arbitrator, regardless of whether the parties independently challenge the arbitration clause. For example, *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (3d Cir. 2000), a case this Court cited as an exception to *Buckeye*, addressed similar facts and reached an opposite conclusion. In *Sandvik*, the defendant requested arbitration, but also claimed no contract existed

because its agent had no binding authority. *Id.* at 100. The Third Circuit held that contract formation is a judicial determination regardless of which party seeks arbitration.[9] *Id.* at 106. The court soundly rejected the position the Ninth Circuit now adopts, sensibly reasoning:

> [T]here is something odd about referring this matter to arbitrators without a definitive conclusion on the issue whether an agreement to arbitrate actually existed.... Such a ruling would ... allow arbitrators to determine their own jurisdiction, something that is not permitted in the federal jurisprudence of arbitration.

Id. at 111 (citing *First Options of Chicago*, 514 U.S. at 944; *AT&T Tech.*, 475 U.S. at 651).

The other decisions cited in *Buckeye* footnote 1 also hold that whether an agreement exists is a judicial determination. In *Sphere Drake Ins. Ltd v. All Am. Ins. Co.*, 256 F.3d 587 (7th Cir. 1995), the Seventh Circuit held *Prima Paint* does not apply when a party alleges "no contract came into being." *Id.* at 591. "[A]s arbitration depends on a valid contract an argument that the contract does not exist can't logically be resolved by the arbitrator."

---

[9] In contrast, the Ninth Circuit holds that "one can consent to arbitration by suing under a contract that includes an applicable arbitration clause." *Granite Rock*, 546 F.3d at 1178. This directly conflicts with the Third Circuit and arguably removes jurisdiction from federal courts for actions ranging from suits seeking strike injunctions to suits to compel arbitration.

Id.; *see also Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 856 (11th Cir. 1992) ("[W]hether a party has authority to bind another to an arbitration agreement and whether a party can ratify an arbitration agreement by her conduct — should ordinarily be decided in the trial court before final resolution of a motion to compel arbitration.").

Cases from other Circuits further demonstrate the conflict. *See, e.g., Express Scripts, Inc. v. Aegon Direct Mktg. Servs.*, 516 F.3d 695, 700-01 (8th Cir. 2008) ("district court correctly concluded that *Prima Paint* and *Buckeye* have no application" when one party asserts the agreement containing an arbitration clause is no longer in effect); *Rintin Corp., S.A. v. Domar, Ltd.*, 476 F.3d 1254, 1259 n.3 (11th Cir. 2007) (distinguishing between "challenges to the validity of a contract with an arbitration clause and arguments that a party never consented to such a contract"); *Seawright v. Am. Gen. Fin., Inc.*, 507 F.3d 967, 977 (6th Cir. 2007) (proper for court to determine whether agreement to arbitrate was formed); *Adams v. Suozzi*, 433 F.3d 220, 227-28 (2d Cir. 2005) (court must determine whether parties concluded binding collective bargaining agreement before compelling arbitration); *Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 216-17 (5th Cir. 2003) ("where a party attacks the very existence of an agreement, as opposed to its continued validity or enforcement, the courts must first resolve that dispute"); *Specht v. Netscape Communs. Corp.*, 306 F.3d 17, 26-27 (2d Cir. 2002) ("It is well settled that a court may not compel arbitration until it has resolved 'the question of the very existence' of the contract embodying the arbitration clause."); *Large v. Conseco Fin. Servicing Corp.*, 292 F.3d 49, 54 (1st

Cir. 2002) (distinguishing between cases challenging contract existence and cases seeking rescission of existing contract); *Glass v. Kidder Peabody & Co., Inc.*, 114 F.3d 446 (4th Cir. 1997) (issues of "substantive arbitrability," including whether "valid agreement to arbitrate exists between the parties" are for court); *Va. Carolina Tools, Inc. v. Int'l Tool Supplies, Inc.*, 984 F.2d 113, 118 (4th Cir. 1993) (dispute about "very existence" of contractual relationship must be decided by court). By applying *Buckeye* to strip federal courts of jurisdiction to determine whether a contract exists *unless* one party independently challenges the validity of the arbitration provision, the Ninth Circuit creates a clear division.

Moreover, the Ninth Circuit now enforces arbitration clauses in "tentative" agreements without first determining if any contractual obligations have arisen. Although Granite Rock and Local 287 stipulated ratification was a condition precedent, the Ninth Circuit held it was error for the District Court to determine whether ratification occurred. That contradicts fundamental labor and contract principles.

For example, in *Adams v. Suozzi*, 433 F.3d 220 (2d Cir. 2005), the Second Circuit held that federal courts may not compel arbitration before determining that conditions precedent to a collective bargaining agreement occurred. The court recognized that when there is a "condition precedent to the formation or existence of the contract itself . . . no contract arises 'unless and until the condition occurs.'" *Id.* at 227 (quoting *Oppenheimer & Co., Inc. v. Oppenheim, Appel, Dixon, & Co.*, 86 N.Y.2d

685, 690 (1995)). The district court had a "duty, to determine whether there ever existed an agreement to arbitrate between the parties." *Id.* Arbitration was properly denied because one condition was not met. *Id.* at 226-27.

The Ninth Circuit holds directly the opposite. In labor relations, it is common for parties to agree upon conditions, such as employee ratification, that must be met before a "tentative agreement" becomes a contract.[10] Analogous conditions are placed on commercial deals. This Court should grant this petition to clarify the scope of judicial determination of contract formation issues.

B. This Case Involves Arbitrability Principles Of Utmost Importance To Labor Relations In Addition To Commercial Contracts.

If allowed to stand, the Ninth Circuit's decision will adversely affect labor relations. The holding also has potential implications beyond the labor context. Relying on authority from outside the labor context, the Ninth Circuit's holding affects virtually all commercial contracts in which parties intend to arbitrate disputes arising under their contract.

---

[10] *See, e.g., Hertz Corp.*, 304 NLRB 469 (1991); *Beatrice/Hunt-Wesson, Inc.*, 302 NLRB 224 (1991). Analogously, this Court has instructed that whether a party to a labor contract must arbitrate a grievance after a collective bargaining agreement expired is a *judicial determination*, not an issue for the arbitrator. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 208-09 (1991).

Initially focusing on labor relations, three disruptions flow from the Ninth Circuit decision. First, no concept is more important to labor peace than arbitration. This Court expressly recognizes arbitration "furthers the national labor policy of peaceful resolution of labor disputes." *AT&T*, 475 U.S. at 651. "The willingness of parties to enter into agreements that provide for arbitration of specified disputes would be 'drastically reduced,' however, if a labor arbitrator had the 'power to determine his own jurisdiction....'" *Id.* (quoting *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 371-72 (1984) and Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1509 (1959)). This holding discourages parties from agreeing to arbitration language because of concern an arbitrator will have power to determine whether an agreement was completed. Arbitration awards have far less reviewability than court decisions.

Second, allowing one party to enforce an arbitration clause without giving effect to the remainder of the agreement would impair labor peace. "The grievance and arbitration procedure is conventionally regarded as the union's compensation for surrendering the right to strike during the period while the agreement is in force -- 'the 'quid pro quo' for an agreement not to strike.'" *Int'l Ass'n of Machinists & Aerospace Workers, Progressive Lodge No. 1000 v. Gen. Elec. Co.*, 865 F.2d 902, 903 (7th Cir. 1989) (quoting *United Steelworkers*, 363 U.S. at 578 n.4). No-strike agreements are vital to economic well-being. To discourage arbitration agreements or to allow unions to avail themselves of arbitration provisions in tentative agreements without giving

effect to the no-strike clause poses a real and serious threat to inter-state commerce.

Third, "tentative agreements" are commonplace in labor negotiations. They greatly decrease the amount of time necessary to complete contracts. Tentative agreements give parties a measure of progress that discourages regressive bargaining. Before the decision below, employers and unions knew they tentatively could agree to provisions, including an arbitration clause, without being bound before negotiations concluded. Allowing unions or employers to dispute that a binding contract exists while availing themselves of arbitration discourages tentative agreements containing arbitration provisions. The Ninth Circuit's opinion that a mere "tentative agreement" on arbitration language can spring to life deters using tentative agreements in labor relations.

The importance of arbitration in the field of labor relations is paramount. The Supreme Court is currently considering whether a collective bargaining agreement may require individual employees to arbitrate all employment-related claims. The pending case of *14 Penn Plaza LLC v. Pyett* (Supreme Court Case No. 07-581), follows a series of decisions strongly supporting arbitration, but recognizing the need to draw boundaries to preserve judicial functions. Article III of the United States Constitution confers judicial powers on impartial judges subject to higher court review. The Ninth Circuit holding takes away a threshold judicial determination and places it in the hands of an interested arbitrator. Determining whether the Ninth Circuit has crossed a jurisdictional line is so

important to the future role of arbitration that this Court's should intervene.

II. TO FULFILL THE PURPOSE OF SECTION 301 AND RESOLVE A LONGSTANDING CIRCUIT SPLIT, THIS COURT SHOULD REVIEW THE NINTH CIRCUIT'S DECISION PROVIDING IMMUNITY TO ANY INTERNATIONAL UNION THAT CAUSES A LABOR CONTRACT TO BE VIOLATED.

Over half a century ago, strikes occurring while collective bargaining agreements were in effect threatened the national economy. Congress responded by enacting Section 301(a) to provide uniform federal enforcement of labor contracts. In this case, a non-signatory International Union forced its Local to resume a strike, breaching the newly-approved agreement. The strike inflicted great harm on the Company, as well as employees and their families, all to extort an immunity agreement benefiting the International. By blocking access to the federal courts under Section 301, the Ninth Circuit granted the International the very immunity it attempted to coerce from Granite Rock. This case is a blueprint for international unions and other entities to violate national labor policy with impunity.

Each Circuit has approached the Section 301(a) jurisdictional analysis differently. The Circuit conflict has fully matured with the Ninth Circuit concluding that Congress did not intend to regulate the misconduct of the International, while acknowledging the Third Circuit recognizes a federal cause of action to address the same conduct.

This request for review is anchored on the mandate of a landmark Section 301 decision. In 1957, this Court instructed that Section 301(a) "authorizes federal courts to *fashion a body of federal law for the enforcement of... collective bargaining agreements.*" *Textile Workers of Am. v. Lincoln Mills*, 353 U.S. 448, 450-51 (1957) (emphasis added). The common law to be created under Section 301 is to be fashioned "from the policy of our national labor laws." *Lincoln Mills*, 353 U.S. at 456-57. When a problem lacks express statutory sanction, the problem is to "be solved by *looking at the policy* of the legislation and *fashioning a remedy that will effectuate that policy.* The range of judicial inventiveness will be *determined by the nature of the problem.*" *Id.* (emphasis added). Instructing federal courts to create appropriate remedies, this Court recognized Section 301 as a *gateway jurisdictional statute.* The gaps in substantive law are to be filled by federal common law. The judiciary is to create that law to remedy problems that counteract the legislative purpose. The IBT took over the role of its Local and wrongly caused violation of the no-strike clause agreement for its own benefit. This is exactly the conduct Congress sought to remedy under Section 301.

The express authority to lower courts to fashion Section 301 federal common law makes this Court's oversight essential. This Court has long recognized that national uniformity is particularly important in the field of labor relations: "[I]n enacting § 301 Congress intended doctrines of federal labor law *uniformly* to prevail over inconsistent local rules." *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103, 104 (1962) (emphasis added).

The current lack of uniformity between the Circuits threatens inconsistent judgments and even forum shopping in the context of geographically broad, often national, collective bargaining agreements. Strikes affecting interstate commerce are just as likely to cross state (and Circuit) lines as they are to cross county lines. Court guidance on the common law of Section 301 is essential.

A. This Court Interprets Section 301(a) Broadly To Enforce Labor Contracts — A Directive That Circuits Interpret Inconsistently.

The proper scope of Section 301(a) jurisdiction receives multiple interpretations. This Court has provided some important, but as yet incomplete, guidelines. First, as described above, federal courts are instructed to create federal law and remedies to effectuate the policies of Section 301. *Lincoln Mills*, 353 U.S. at 450-57. Second, "§ 301 is not to be given a narrow reading." *Smith v. Evening News Ass'n*, 371 U.S. at 195, 199 (1962). Third, the statutory language does not limit possible parties to federal actions; the word "between" in the language providing federal jurisdiction for all "suits for violations of contracts *between* an employer and a labor organization," does not refer to the status of the parties to the suit. *Smith*, 371 U.S. at 200 (emphasis added); *Wooddell v. Int'l Bhd. of Elec. Workers, Local 71*, 502 U.S. 93 100-01 (1991). Fourth, all that is required for subject matter jurisdiction under Section 301 is that the suit was "filed *because a contract has been* violated." *Textron Lycoming Reciprocating Engine Div. v. United Auto. Workers*, 523 U.S. 653 (1998) (emphasis in

original).[11] Fifth, to ensure uniform interpretation of labor contracts, the preemptive power is so complete that a cause of action "arises under" Section 301 if (1) the suit alleges contract violations; *or* (2) resolving the suit would require a court to interpret the agreement. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210, 212, 213 (1985) ("If the policies that animate § 301 are to be given their proper range, however, the pre-emptive effect of § 301 must extend beyond suits alleging contract violations"); *accord Int'l Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851, 858-59 (1987).

This Court, however, has *not yet addressed* whether jurisdiction exists under Section 301(a) for a suit against an entity that did not sign a collective bargaining agreement, but caused a violation of the contract. Lower courts have struggled to apply the Court's guidelines to determine whether subject matter jurisdiction exists under Section 301 to remedy this harm. The need for guidance is clear, the issue has fully matured, and the time to decide this question has arrived.[12] *See United Food & Comm. Workers Union, Local No. 1564 v. Quality Plus Stores, Inc.*, 961 F.2d 904, 906 (10th Cir. 1992)

---

[11] In *Textron*, this Court held that Section 301 does not provide jurisdiction for claims that a contract is invalid, *e.g.*, because of fraud. 529 U.S. at 658. In so holding, the Court focused on the fact that no party alleged the contract was violated. The Court did not have occasion to examine a claim that a valid contract was breached because of a third party. This case presents that opportunity.

[12] In 1982, this Court declined to review a case holding directly opposite to the Ninth Circuit's holding. *Newspaper Guild of Wilkes-Barre v. Wilkes-Barre Pub. Co.*, 454 U.S. 1143 (1982). Subsequently, every Circuit has cited *Wilkes-Barre*. A mature Circuit conflict now exists.

(recognizing "a number of circuits have addressed this issue with differing results"); *Int'l Union, United Mine Workers v. Covenant Coal Corp.*, 977 F.2d 895, 897 (4th Cir. 1992) ("The question of whether section 301 of the LMRA confers federal jurisdiction to hear claims against non-signatories of a collective bargaining agreement for tortious interference with that agreement has occasioned a split in the circuits").

An acknowledged and complex Circuit split exists regarding whether Section 301(a) may provide a cause of action against a non-signatory party, such as an international union or parent company, that is able to cause a contract violation because of the influence it has over a signatory. This issue has been directly or indirectly considered by virtually all Circuits, with dramatically different analyses and varied results.

B. The Ninth Circuit Decision Directly Conflicts With Decisions From Other Circuits That Recognize Section 301(a) Jurisdiction For Contractual Interference By Non-Signatories.

The Third Circuit clearly recognizes a Section 301 action for contractual interference by a non-signatory. *Wilkes-Barre Publishing Co. v. Newspaper Guild of Wilkes-Barre, Local 120*, 647 F.2d 372, 381 (3d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). In that case, an employer sued a non-signatory international union for inducing a breach of a labor contract. *Id.* at 376. The court "analyze[d] the problem in terms of *the need to enforce a collective bargaining agreement*" and held that Section 301(a) jurisdiction "reaches not only suits on

labor contracts, but *also suits seeking remedies for violations of such contracts.*" *Id.* at 380, 381 n.6 (emphasis added). The Third Circuit emphasized, "[t]he label attached to the remedy as tort or contract is not dispositive of the scope of federal common law which under Section 301(a) it is our responsibility to create." *Id.* at 381. In the Third Circuit, "a claim of tortious interference with a labor contract" is "recognized as stating a claim under the federal common law of labor contracts." *Id.* at 379.

The Third Circuit's holding built upon its own prior conclusion that "[i]t is but a small step further [from the Court's holding in *Smith*] that the same federal common law of collective bargaining agreements permits a suit against [the non signatory party], and the [signatory party] which allegedly acted in concert for the destruction of the value of the bargained-for and vested contract rights." *Nedd v. United Mine Workers*, 556 F.2d 190, 197 (3d Cir. 1977).

"The law of the Eleventh Circuit on this topic is unclear." *Covenant Coal Corp.*, 977 F.2d at 897 n.2. In *United Association of Journeymen and Apprentices v. Georgia Power Co.*, 684 F.2d 721 (11th Cir. 1982), the Eleventh Circuit recognized a claim for "tortious interference with a collective bargaining agreement." *Id.* at 725. The court reasoned that the "national interest in a uniform body of labor relations law requires that the plaintiff's claim be judged by principles of federal law . . . ." *Id.* The court "agree[d] with the reasoning of the Third Circuit in *Wilkes-Barre*" that the label of the remedy as tort or contract is irrelevant to the common law that federal courts are responsible for

creating. *Id.* "A holding that tortious interference with a collective bargaining agreement is not a matter governed by federal law would leave open the possibility of lack of uniformity in scope of obligation which the Court in *Lucas Flour* sought to prevent." *Id.* at 725-26.

The Eleventh Circuit has never expressly overruled *Georgia Power*. Despite the *Georgia Power* conclusion that claims alleging interference with labor contracts are federal in nature, however, the Eleventh Circuit contradicted that decision in *Xaros v. U.S. Fidelity & Guarantee Co.*, 820 F.2d 1176 (11th Cir. 1987). Without referencing *Georgia Power*, the Eleventh Circuit held in *Xaros* that Section 301 provides jurisdiction "only against those who are parties to the contract in issue." *Id.* at 1181. *Georgia Power* indicates the Eleventh Circuit would recognize the cause of action under a reading of Section 301 to include suits against parties who have not directly signed a labor contract.

The Ninth Circuit's holding in *Granite Rock* directly conflicts with Third Circuit, and arguably Eleventh Circuit, law. The Ninth Circuit recognized the divide by acknowledging the Third Circuit has "adopted Granite Rock's position." *Granite Rock*, 546 F.3d at 1174 (emphasis added).[13] Virtually

---

[13] The Ninth Circuit's statement that "[t]he only circuit to have adopted Granite Rock's position is the Third," is misleading at best. *Granite Rock*, 546 F.3d at 1174. What emerges from carefully reviewing the case law is long-standing fragmentation in need of direction on the proper scope of Section 301(a). For example, the Second Circuit has favorably cited Third and Eleventh Circuit decisions permitting contractual interference claims under Section 301(a), but rejected this claim under the Railway Labor Act (45 U.S.C. §§ 151-188). *Baylis v. Marriott*

every other Circuit has implicitly or explicitly considered this issue. The differing results stem from the Circuits' use of *widely differing analyses to determining Section 301 jurisdiction and fashioning federal common law and remedies.* This demonstrates compelling need for Supreme Court review.

C. Reflecting Fundamental Differences And Confusion, The Circuits Are Divided About Whether Section 301(a) Ever Provides Jurisdiction For Claims Against Non-Signatories.

Even after *Smith* and *Wooddell*, some Circuits continue to focus on the *status of the parties*, rather than the nature of the action, to determine whether jurisdiction exists. The status of the parties is the sole determinant in the Fourth Circuit, which generally prohibits Section 301 claims against any entity that did not sign a collective bargaining agreement, regardless of the nature of the claim. *Int'l Union, United Mine Workers v. Covenant Coal*, 977 F.2d 895, 897 (4th Cir. 1992) (holding international union could not bring Section 301 action against company causing its contractors to repudiate collective bargaining agreements simply

---

Corp., 843 F.2d 658, 664 (2d Cir. 1988). Before *Granite Rock*, the Fourth Circuit cited the Ninth Circuit as already allowing a claim of contractual interference under Section 301. *Int'l Union, United Mine Workers v. Covenant Coal Corp.*, 977 F.2d 895, 897 (4th Cir. 1992) (citing *Painting & Decorating Contractors Ass'n v. Painters & Decorators Joint Comm.*, 707 F.2d 1067, 1070-71, n.2 (9th Cir. 1983)). There is even less consistency in the analyses employed by each Circuit.

because the company "was not a party to any agreement with the Union").

Similarly, the Tenth Circuit has held that "section 301 does not establish subject-matter jurisdiction for a federal common law claim of tortious interference against an entity that is not a signatory to the contract." *United Food & Commercial Workers Union, Local No. 1564 v. Quality Plus Stores, Inc.*, 961 F.2d 904, 906 (10th Cir. 1992). In *Quality Plus*, the court barred a union from suing a third party creditor for allegedly causing an employer to violate a labor contract, holding that "section 301 does not establish subject-matter jurisdiction for a federal common law claim of tortious interference against an entity that is not a signatory to the contract." *Id.* In rejecting the claim, the court misinterpreted the language of Section 301 as precluding jurisdiction when "[t]here is no collective bargaining agreement *between the parties to the action*." *Id.* (emphasis added); *compare with Smith*, 371 U.S. at 200 (word "between" in Section 301(a) does not refer to status of parties). In large part, the Tenth Circuit was precluded from recognizing contractual interference claims by interpreting the statute as excluding suits against non-signatories. The Tenth Circuit also distinguished *Wilkes-Barre*, which, as in this case, involved an international union having the power to influence a signatory. *See also Serv., Hosp., Nursing Home & Pub. Employees Union, Local No. 47 v. Commercial Prop. Servs., Inc.*, 755 F.2d 499, 501 (6th Cir. 1985) (distinguishing *Wilkes-Barre* as, like the IBT in this case, involving a "co-venturer in an enterprise which allegedly breached the collective bargaining agreement"). The manner in which the

Tenth Circuit distinguished *Wilkes-Barre* indicates it may have reached a different result from the Ninth Circuit if addressing facts similar to this case.

The Seventh Circuit has also rejected contractual interference claims against non-signatories based on a reading of Section 301 as providing jurisdiction only for suits against parties to a labor contract. *Loss v. Blankenship*, 673 F.2d 942 (7th Cir. 1982). However, that Circuit has now moved away from focusing on the status of the parties. *Teamsters Nat'l Auto. Transporters Indus. Negotiating Comm. v. Troha*, 328 F.3d 325, 330 (7th Cir. 2003). In *Troha*, the court moved to a focus on the "nature" of the action rather than the status of the parties, explaining:

> In general we have viewed this authorization to create federal law under § 301 as limited to disputes between signatories of the collective bargaining agreement.... But this rule is not absolute. Indeed, the limitation is more aptly described not in terms of parties but in terms of the purpose of a lawsuit.... *When the purpose of the lawsuit effectuates the goals of § 301, then it is appropriate for federal common law to embrace such suits.* The Court in *Lincoln Mills* explained the reason for authorizing the creation of federal common law in this area: The legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should

> enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained in only that way.

Id. at 330 (extending Section 301 jurisdiction to actions against third parties to enforce arbitration subpoenas). Using this test, a contractual interference claim like that alleged against the IBT would be viable.

Like *Wilkes-Barre*, most circuits have now found it necessary to permit jurisdiction over non-signatories in at least some contexts. *See also Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489 (5th Cir. 1982) (affirming jurisdiction over non-signatory engaged in unlawful non-union double-breasted operations with signatory employer); *Am. Fed. of TV & Radio Artists v. WJBK-TV*, 164 F.3d 1004 (6th Cir. 1999) (relying on *Wilkes-Barre* to enforce arbitration subpoena against non-signatory).

Federal courts urgently need guidance on the scope of Section 301 jurisdiction. In many of the decisions rejecting Section 301 contractual interference claims, the only basis was a flawed reading of the statute to preclude *any* Section 301 suits against non-signatories. The Ninth Circuit historically allowed Section 301 suits against non-parties. *Painting & Decorating Contractors Ass'n v. Painters & Decorators Joint Comm.*, 707 F.2d 1067, 1071 (9th Cir. 1983). Nevertheless, in *Granite Rock*, the Ninth Circuit blindly followed Circuits barring actions against non-signatories. 546 F.3d at 1174 (following *Covenant Coal Corp.*, 977 F.2d at 897; *Carpenters Local Union No. 1846 v. Pratt-*

Farnsworth, Inc., 690 F.2d 489, 501 (5th Cir. 1982); *Serv., Hosp., Nursing Homes & Public Employees Union, Local No. 47 v. Commercial Prop. Servs., Inc.*, 755 F.2d 499, 506 (6th Cir. 1985); *Loss*, 673 F.2d at 948; *Quality Plus*, 961 F.2d at 906). The Court should grant review to determine whether this narrowed the scope of Section 301 jurisdiction in a way that contradicts the *Lincoln Mills* mandate.

D. The Circuits Have Divided On Whether Contractual Interference Claims Arise Under Section 301 Because They Require Determining Whether A Labor Contract Was Violated.

Another source of inconsistency and confusion amongst federal courts is defining the federal common law action for contractual interference under Section 301 and whether a contractual interference claim "arises under" Section 301 when such a claim cannot be resolved without adjudicating whether a labor contract was breached. Section 301 preempts state claims that require interpreting any term of a collective bargaining agreement, such as its no-strike language. *See Lueck*, 471 U.S. at 212, 220. Applying this directive, Circuit division has occurred, with some Circuits holding a contractual interference claim arises under Section 301 because the claim requires proving a labor contract was breached, and others applying different analyses.

One of the most fundamental common law maxims is that "for every wrong, there is a remedy." *See, e.g., Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is

invaded."). With *Granite Rock*, the Ninth Circuit has left a wrong without a remedy. In *Milne Employees Ass'n v. Sun Carriers, Inc.*, 960 F.2d 1401 (9th Cir. 1992), the Ninth Circuit held that Section 301 preempts California tort claims for contractual interference because proving a contract breach is an essential element under California law. *Id.* at 1412. Therefore, Granite Rock was precluded from seeking a remedy in California state court. While the Ninth Circuit held that interpretation of the Agreement was not necessary, it was the only Circuit to do so in a state in which proving a breach of contract is a required element.

The Eleventh Circuit held differently in *Georgia Power*. The court emphasized one would have to "defy reason" to conclude that a claim of tortious interference with a labor contract does not substantially depend upon analyzing the terms of that contract. *Ga. Power*, 684 F.2d at 725. Therefore, state tort claims were preempted. *Id.*

In contrast, the Sixth Circuit, applying Ohio law which does not require proving a breach of contract, struggled to hold that Section 301 does not preempt Ohio tort claims for contractual interference. *Dougherty v. Parsec, Inc.*, 872 F.2d 766, 771 (6th Cir. 1989) (stating "it would not further the policies of either the Congress in enacting the federal labor statutes, or the Supreme Court . . . to give a third party who has allegedly interfered with a labor contract what effectively amounts to immunity").

The Seventh Circuit decision in *Loss v. Blankenship*, cited in the decision below, assumed the wrong would not be left without a remedy

because Section 301 would not preempt a state cause of action. 673 F.2d at 948. The court disagreed with the court's conclusion in *Wilkes-Barre* that contractual interference must be addressed under Section 301 because of the need for uniform contract interpretation, stating: "We fail to see, however, in what way the need for uniformity dictates a holding that tortious interference with contract is actionable under § 301." *Id.* This Court subsequently decided *Lueck*, holding that claims requiring interpretation of a collective bargaining agreement *are* preempted by and arise under Section 301.

In this case, the court failed to even acknowledge that the Ninth Circuit holds that Section 301 preempts California tort claims for interference with a collective bargaining agreement. *See Milne*, 960 F.2d at 412. Narrowly reading this Court's mandate to fashion appropriate remedies as "a mandate to create a federal common law of labor contract interpretation, not an independent body of tort law[,] the Ninth Circuit holds that "[a]ny 'gap' that might exist in Congress's labor law design is ... not for us to fill." *Granite Rock*, 546 F.3d at 1175. In doing so, the court has left Granite Rock with no remedy and allowed the IBT to violate the purpose of the LMRA with impunity.

E. Congress Intended Section 301(a) To Promote Labor Peace, A Matter of Great National Importance That Is Thwarted If Entities With The Power To Influence Signatories, Such As International Unions, Are Immune.

The Company-wide strike Granite Rock and its employees suffered in 2004 is precisely the harm

Congress enacted Section 301(a) to prevent. The Ninth Circuit's decision, however, permits an international union to subvert the agreements of its local unions to extract further promises. In this case, the International's goal was full immunity; the Ninth Circuit provided that.

The Ninth Circuit decision lays out an immunity plan for unions: Have a local union with few assets sign the collective bargaining agreement; make sure the international union is not a signatory; have the international union cause and conduct economic warfare against the employer; have the international union claim no liability under Section 301 because it did not "sign" the collective bargaining agreement; have the international union also claim immunity from state court prosecution *based on Section 301* preemption. The result: A blueprint for industrial chaos, not peace, and exactly the interference with interstate commerce that Section 301 was enacted to prevent.

That result is unjustifiable and contrary to the legislative intent, and this Court's interpretation of Section 301. If allowed to stand, the Ninth Circuit's holding will cause uncertainty during the term of a collective bargaining agreement regarding recurring economic disputes. This is not speculation. This is a description of what occurred in the labor dispute underlying this case and what will occur for other employers if this decision stands.

This Court has long recognized that Congress enacted Section 301 to promote enforcement of collective bargaining agreements by providing a federal forum, common law, and appropriate remedies. *Lincoln Mills*, 353 U.S. at 453.

While the complex split between Circuits has evolved and matured for more than two decades, the Ninth Circuit brings this controversy to a boil. More than any other decision, it provides a blueprint for economic self-interest without regulation or restraint. One needs to look no further than the financial community to see the harm that can be caused by unchecked economic power inspired by self-interest. Here, an international union used great economic force to attempt to extort a written assurance of immunity. Millions of dollars of harm occurred not just to a business that employs 800 people, but to union members and families. Without the intervention of this Court, the law of the Ninth Circuit will stand as an announcement that Congress failed in the passage of Section 301(a) to provide a remedy for reaching a wrongdoer that maliciously causes a breach of a labor contract for its own gain.

III. CONCLUSION

Supreme Court review is necessarily reserved for conflicting Circuit Court decisions and matters of national importance. In this case, both holdings reflect mature and explicit Circuit Court conflicts. National importance is inherent in defining the reach of arbitration and in protecting a uniform national labor policy. This case calls for review not just because of divided Circuits and importance, but also because the Ninth Circuit now judicially categorizes blatant wrongdoing as beyond the reach of law. In passing Section 301(a), Congress clearly stated its purpose to prevent economic warfare during the term of a labor contract. The current case is a quintessential example of the wrong Congress sought to remedy. Accordingly, Granite Rock respectfully requests that this Court grant review.

Respectfully Submitted,

Arthur R. Miller
Of Counsel
New York University
School of Law
40 Washington Square
South
Vanderbilt Hall 409D
New York, NY 10012
Telephone: 212.992.8147

Garry G. Mathiason
Counsel of Record
Alan S. Levins
Adam J. Peters
Kimberly L. Owens
LITTLER MENDELSON
A Professional Corporation
650 California Street,
20th Floor
San Francisco, CA 94108
Telephone: 415.433.1940

United States Court of Appeals,
Ninth Circuit.

GRANITE ROCK COMPANY, Plaintiff-Appellant,
v.
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, FREIGHT CONSTRUCTION, GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL 287 (AFL-CIO); International Brotherhood of Teamsters, Defendants-Appellees
Granite Rock Company, Plaintiff-Appellee,
v.
International Brotherhood of Teamsters, Freight Construction, General Drivers, Warehousemen & Helpers, Local 287 (AFL-CIO), Defendants-Appellants,
and
International Brotherhood of Teamsters, Defendant.
Granite Rock Company, Plaintiff-Appellant,
v.
International Brotherhood of Teamsters, Freight Construction, General Drivers, Warehousemen & Helpers, Local 287 (AFL-CIO); International Brotherhood of Teamsters, Defendants-Appellees.

Nos. 07-15040, 07-16142, 07-16236.

Filed Oct. 22, 2008.

Appeal from the United States District Court for the Northern District of California; James Ware, District Judge, Presiding. D.C. No. CV-04-02767-JW.

1171 Before: RONALD M. GOULD and CARLOS T. BEA, Circuit Judges, and JAMES W. SEDWICK, District Judge.

GOULD, Circuit Judge:

Granite Rock Company ("Granite Rock") sued International Brotherhood of Teamsters, Local 287 ("Local 287") and International Brotherhood of Teamsters ("IBT") under section 301(a) of the Labor Management Relations Act ("LMRA") with claims relating to a collective bargaining agreement. Granite Rock seeks remedies against Local 287 for breach of the collective bargaining agreement, and against IBT for tortious interference with the collective bargaining agreement between Granite Rock and Local 287. The district court dismissed the claim against IBT under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Granite Rock appeals that dismissal, and we affirm.

In the dispute between Granite Rock and Local 287, the parties appeal and cross-appeal a total of five orders, but we need reach only one: the district court's denial of Local 287's motion to compel arbitration on the question of contract formation. We reverse that ruling and remand with instructions to compel arbitration on the entire dispute between Granite Rock and Local 287.

I

For purposes of analyzing the district court's dismissal of Granite Rock's claims against IBT, Granite Rock's alleged facts must be presumed true

*The Honorable John W. Sedwick, Chief United States District Judge for the District of Alaska, sitting by designation.

and viewed in the light most favorable to Granite Rock. *Pakootas v. Teck Cominco Metals, Ltd.,* 452 F.3d 1066, 1069 (9th Cir.2006). Granite Rock alleges: Granite Rock is a California company engaged in supplying ready mixed concrete for commercial use, and Local 287 represents certain employees at Granite Rock's San Jose facility. Between March 1, 1999 and April 30, 2004, Granite Rock and Local 287 were parties to a collective bargaining agreement ("CBA"). Before expiration of that agreement, the parties began negotiations. Throughout the negotiations, Rome Aloise ("Aloise"), the administrative assistant to the General President of IBT, advised Local 287 that certain provisions of the CBA were inadequate. Aloise also represented the interests of IBT and other local unions affiliated with IBT in the negotiations. No resolution was reached in April or May, and in early June, 2004, after the CBA between Granite Rock and Local 287 expired, Local 287 members went on strike. Negotiations resumed shortly thereafter, and the parties reached a tentative four-year agreement ("new CBA") at 4:00 a.m. on July 2, 2004. This tentative agreement contained a broad arbitration clause requiring the parties to arbitrate "[a]ll disputes arising under this agreement."

At the conclusion of the successful bargaining session, George Netto ("Netto"), Business Representative for Local 287, told Granite Rock's CEO Bruce Woolpert that Netto would put the new CBA to a vote among the union members, would recommend ratification, and would cease picketing. At the same time, Netto raised the topic of a "back-to-work" agreement to provide for the terms under which the parties would return to work, including

liability for actions taken during the strike. However, the parties agreed to discuss preparing a back-to-work agreement at a later date.

*1172 Local 287 members allegedly ratified the new CBA, which contained a "no-strike" clause, later on the morning of July 2, 2004. However, on July 5, 2004, Aloise and members of Local 287 called workers to instruct them not to return to work the next day. On July 6, 2004, Netto demanded a back-to-work agreement that would explicitly shield Local 287, its members, and IBT from any liability arising from the strike. Granite Rock refused to sign such an agreement, and Local 287 continued its strike in violation of the no-strike clause. Throughout the strike, Aloise played an active leadership role; he sent letters to other local unions and employees encouraging their support, held meetings to discuss strategy, and sought to secure financial support for the strike. IBT gave benefits to Local 287 members as long as they did not return to work.

Granite Rock's Third Amended Complaint alleged breach of contract against Local 287, and tortious interference with contract against IBT. Both actions were asserted under section 301(a) of the LMRA, 29 U.S.C. § 185(a). Defendant IBT moved to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The district court granted that motion on the grounds that Granite Rock failed to state a claim against IBT under section 301(a). Granite Rock timely appealed.

There is only one fact that is critical to our determination of whether the entire dispute between Granite Rock and Local 287 should have been submitted to arbitration, and that fact is undisputed:

While the parties disagree about the ratification date, they agree that the tentative new CBA reached on July 2, 2004, contains an arbitration clause that requires arbitration for "[a]ll disputes arising under this agreement." Interpreting this clause, the district court dismissed the issues of breach and damages in favor of arbitration, but retained the question of contract ratification for the district court's determination. Local 287 timely appealed the order retaining the formation question.

Because we determine that the district court erred by denying Local 287's motion to compel arbitration of the entire dispute, and we remand for arbitration, we need not address the appealed orders that arose from the district court's rulings in resolving on the merits the issue of contract formation by ratification.

II

The district court's dismissal of Granite Rock's claims against IBT presents questions of law which we review *de novo. Pruitt v. Cheney,* 963 F.2d 1160, 1162-63 (9th Cir. 1992).

[1] Section 301(a) of LMRA, 29 U.S.C. § 185(a), provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Jurisdiction over a claim under section 301(a) requires two things: First, that the claim be "based on an alleged breach of contract between an employer and a labor organization," and second, "that the resolution of the lawsuit be focused upon and governed by the terms of the contract." *Painting & Decorating Contractors Ass'n v. Painters & Decorators Joint Comm., Inc.*, 707 F.2d 1067, 1071 (9th Cir. 1983).

A party need not be a signatory to a CBA to come within the purview of section 301(a). In *Painters & Decorators,**1173 the "Joint Committee" created by the bargaining agreement to administer the terms of the agreement was not a signatory of the agreement. We held that the Committee was still an appropriate defendant under section 301(a) because the CBA created the Committee and governed its rights and duties. *Id.* at 1069.

However, the second part of the *Painters and Decorators* test requires that resolution of any section 301(a) claim be governed by the terms of the relevant agreement. In *Carpenters S. Cal. Admin. Corp. v. Majestic Housing,* 743 F.2d 1341 (9th Cir. 1984), the defendant's property was subject to a mechanic's lien because a party to the collective bargaining agreement had not made required trust contributions. 743 F.2d at 1343. The district court found jurisdiction under section 301(a) because the lien foreclosure would require interpretation of the collective bargaining agreement. *Id.* at 1345. We reversed, holding that "mere reference to the collective bargaining agreement does not make this a case 'arising under' federal law within the meaning of 28 U.S.C. § 1441." *Id.*

Although *Majestic Housing* dealt with rights under a mechanic's lien, its reasoning also applies to tort claims. The underlying agreement in *Majestic Housing* was relevant to the mechanic's lien because the lien could only be foreclosed if the contract was violated, just as a tortious interference with contract claim depends on a breach. The court in *Majestic Housing* held that such a connection is inadequate to satisfy the requirements of section 301(a). 743 F.2d at 1345.

[2] Applying the rule developed in *Majestic Housing,* we conclude that the district court was correct to dismiss Granite Rock's claim against IBT because a claim for tortious interference cannot be said to "arise under" the new CBA between Granite Rock and Local 287. *Majestic Housing,* 743 F.2d at 1345. That agreement did not mention IBT, and did not govern any rights or duties of IBT. Indeed, Granite Rock concedes that the alleged tortious interference could only be a violation of a general tort duty, not a violation of any specific contractual duty. Notwithstanding, Granite Rock contends that the alleged tortious interference claim still meets the requirement that "the resolution of the lawsuit be focused upon and governed by the terms of the contract." *Painters & Decorators,* 707 F.2d at 1071. Granite Rock's theory is that because breach of the underlying contract is a necessary element of the tortious interference claim, the resolution of the tort claim is "focused upon" and "governed by" the contract.

[3] We reject Granite Rock's argument, because its position clashes with the plain language of section 301(a) and the *Majestic Housing* requirement that

the underlying agreement must have *created* the rights or liabilities which the parties seek to vindicate by their suit. *Majestic Housing,* 743 F.2d at 1345. We made this distinction clear in *Majestic Housing:* In *Painters and Decorators,*" the rights and liabilities of both parties were determined by the bargaining agreement," but in *Majestic Housing,*" although the amount of the mechanic's lien must be determined by the terms of the collective bargaining agreement, Majestic has no rights or liabilities *under the agreement.*" *Id.* Similarly, IBT has no rights or duties under the agreement, and thus Granite Rock's tortious interference claim against IBT does not meet the requirements of section 301(a).

Granite Rock makes an additional argument in its unsuccessful attempt to bridge this gap: that the "close relationship" between IBT and Local 287, at least when presented with IBT's aim to "benefit" from *1174 the breach by gaining a release of liability through the proposed back-to-work agreement, justifies allowing a tort claim against IBT. Although Granite Rock's argument has some emotive force, Granite Rock provides no persuasive case support for its position, and does not explain adequately how the concepts of "close relationship" and "benefit" bring IBT within the scope of the contractual rights and obligations created by the new CBA.[1]

---

[1] It is undisputed that the separate back-to-work agreement was never signed, and IBT is not transformed into a third party beneficiary or obligor by supporting an abandoned addendum to the relevant collective bargaining agreement.

Moreover, although there may be limited section 301 remedies available when parties are so intertwined that one is the "alter

The majority of our sister circuits to have considered the question have declined to find a section 301(a) cause of action against parties not governed by the relevant agreement. *See Int'l Union, United Mine Workers of America v. Covenant Coal Corp.*, 977 F.2d 895, 897 (4th Cir. 1992) ("The majority of courts to address the issue have refused to construe section 301 in such a way as to allow [tortious interference claims against non-signatories.]"); *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 501 (5th Cir. 1982) ("[C]ourts have almost unanimously held that a section 301 suit may be brought for violation of a labor contract only against those who are parties to the contract at issue."). Although there are some variations in phrasing, the circuits are almost unanimous in rejecting LMRA jurisdiction over a claim such as Granite Rock's claim against IBT. *See Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561, 572 (2d Cir. 1995) (holding that "at a minimum the defendant must have breached some duty created by a labor contract to be liable for a violation" under section 301(a)); *Covenant Coal*, 977 F.2d at 897 (declining to find jurisdiction under section 301(a) for a tortious interference with contract claim); *Pratt-Farnsworth*, 690 F.2d at 501-02 (holding, in response to plaintiffs' arguments that defendants had "conspired" with the alleged breaching party, that "the absence of a

---

ego" of the other, and a plaintiff might be able to recover by "piercing the veil," *see Local 159 v. Nor-Cal Plumbing, Inc.*, 185 F.3d 978, 984-85 (9th Cir. 1999) (finding jurisdiction under section 301 because the veil-piercing theory "merely concern[ed] the remedy attached to a breach of contract claim governed by LMRA," and was not a separate tort cause of action), Granite Rock did not pursue such a theory in the district court.

contractual relationship between [the parties] requires dismissal of the section 301 claim"); *Serv., Hosp., Nursing Home & Public Employees Union, Local No. 47 v. Commercial Prop. Servs., Inc.*, 755 F.2d 499, 506 (6th Cir. 1985) (holding "that a district court does not have subject matter jurisdiction over a non-signatory to a collective bargaining agreement, where no rights or duties of the non-signatory party are stated in the terms and conditions of the contract"); *Loss v. Blankenship*, 673 F.2d 942, 948 (7th Cir. 1982) (holding "that a complaint for interference with a collective bargaining agreement, against a non-party to that agreement, is not actionable under § 301(a) of the LMRA"); *United Food & Com. Workers Union, Local No. 1564 v. Quality Plus Stores, Inc.*, 961 F.2d 904, 906 (10th Cir. 1992) (concluding "that section 301 does not establish subject-matter jurisdiction for a federal common law claim of tortious interference against an entity that is not a signatory to the contract").

The only circuit to have adopted Granite Rock's position is the Third. *Wilkes-Barre Publishing Co. v. Newspaper Guild Local 120*, 647 F.2d 372 (3d Cir. 1981). In *1175 *Wilkes-Barre*, the court held that tortious interference claims do arise under the underlying contract because "an essential element of the cause of action ... is a violation of the collective bargaining agreement." *Id.* at 380-81. We rejected similar reasoning in *Majestic Housing*, where we held that "mere reference to the collective bargaining agreement" is inadequate to confer jurisdiction under section 301(a). 743 F.2d at 1345.[2]

---

[2] The Eleventh Circuit initially seemed to adopt the Third Circuit's approach in *Local 472, United Ass'n of Journeymen &*

Granite Rock attempts to distinguish cases from other circuits by arguing that they did not deal with parties who are "closely related" or who "benefitted from" the breach. As discussed above, these distinctions are unsupported by precedent and the fact remains that only the Third Circuit has recognized a tortious interference claim under section 301(a).

Granite Rock's assertion that we should create federal common law to reach IBT misinterprets our instructions from Congress and the Supreme Court. The Supreme Court has said that section 301 can be read as a "congressional mandate to the federal courts to fashion a body of common law to be used to address disputes arising out of labor contracts." *Allis-Chalmers v. Lueck,* 471 U.S. 202, 209, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985). However, based on the language of section 301(a) and *Allis-Chalmers,* we understand this as a mandate to create a federal common law of labor contract interpretation, not an independent body of tort law. *Accord, Brazinski v. Amoco Petroleum Additives Co.,* 6 F.3d 1176, 1180 (7th Cir. 1993) ("The common law to be made is a common law of contracts, not a source of independent rights, let alone tort rights; for section 301 is as we have said a grant of jurisdiction only to enforce contracts.").

Apprentices v. Georgia Power Co., 684 F.2d 721, 725 (11th Cir. 1982). However, the Eleventh Circuit then implicitly overruled that precedent when it held, in *Xaros v. U.S. Fid. and Guar. Co.,* 820 F.2d 1176, 1181 (11th Cir. 1987), that section 301(a) jurisdiction did not lie when the defendant was not a signatory to the underlying contract, because the cause of action did not "arise under the agreement but [was] merely related to it." *Id.*

Finally, Granite Rock's invocation of legislative intent does not persuade us. Congress intended to improve the enforcement of bargaining agreements via the LMRA. S.Rep. No. 80-105 (1947). But "[n]othing in the legislative history of § 301 bears on the question of holding a nonsignatory to a collective bargaining agreement." *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 503 n. 6 (5th Cir. 1982). Granite Rock asks us to extrapolate from Congress's general purpose a tort claim against IBT, despite the language of the statute, in the interests of "fundamental fairness." We decline to do so. The plain language of the statute appears to require at least that rights or obligations created by a labor agreement be in contest to support a section 301(a) challenge. Moreover, the persuasive array of authority in our sister circuits counsels against adopting Granite Rock's position, and leads us instead to take the beaten path established by this extra-circuit precedent.

Any "gap" that might exist in Congress's labor law design is for Congress and not for us to fill. When Congress regulates an area comprehensively, as it has done in the federal labor laws, rights and remedies can be defined and circumscribed. Congress has not left parties such as Granite Rock altogether without recourse. It has provided for remedies in labor disputes through both section 301-against parties to the bargaining agreement-and through the National Labor Relations Act, 29 U.S.C. §§ 151-169. Indeed,*1176 Granite Rock vigorously pursued actions against Local 287 in the federal courts as well as in the National Labor Relations Board. If Congress did not provide a remedy for

Granite Rock directly against IBT on its asserted tortious interference claim, then that is an issue to be addressed by Congress, not by an extraordinary and outlier interpretation of the governing statute.

[4] We affirm the dismissal of Granite Rock's claims against IBT.[3]

III

We review de novo the effect of the arbitration clause in the alleged new CBA between Granite Rock and Local 287. *See Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257, 1267 (9th Cir. 2006) (en banc).

---

[3] Language in section 301(a) of the LMRA strongly suggests that its requirements are necessary to confer subject-matter jurisdiction on the federal courts: The action "may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U.S.C. § 185(a); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (reasoning that similar language in the Clean Water Act made the Act's requirements jurisdictional). This reading is consistent with our precedent. *See Majestic Housing*, 743 F.2d at 1345 (holding that "mere reference" to a collective bargaining agreement does not confer federal question jurisdiction under section 301(a)). Thus, a failure to state a claim under section 301(a) of the LMRA is a defect in subject-matter jurisdiction, and Granite Rock's claim against IBT here should have been dismissed under Federal Rule of Civil Procedure 12(b)(1), not 12(b)(6) as the district court held. This difference in theory, however, leads to the same result of dismissal. We may affirm the district court's dismissal of the claim on any grounds supported by the record, even if the district court did not rely on those grounds. *See United States v. State of Wash.*, 969 F.2d 752, 755 (9th Cir. 1992).

[5] The United States Supreme Court has drawn a distinction between challenges to an arbitration clause and challenges to an entire contract. The Court has stated this general rule: "[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 445-46, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006); *see Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 403-04, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). The Ninth Circuit recognized this dichotomy recently in *Nagrampa,* where we held that federal courts must refer to arbitration those claims seeking to "invalidate or otherwise directly affect the entire contract," 469 F.3d at 1271, but may hear "challenges specifically to [an] arbitration agreement." *Id.* at 1269.

[6] Consistent with this framework, a party generally may not sue in federal court under a contract that, by its terms, requires arbitration. *Teledyne, Inc. v. Kone Corp.,* 892 F.2d 1404 (9th Cir. 1989). In such cases, the matter must be sent to arbitration "unless there is a challenge to the arbitration provision which is separate and distinct from any challenge to the underlying contract." *Id.* at 1410 (citing *Prima Paint,* 388 U.S. at 402-04, 87 S.Ct. 1801). In *Teledyne,* the plaintiff sued for breach of contract, and defendant argued that the draft agreement was never finalized. *Id.* We upheld the dismissal of the claim, in favor of arbitration, to avoid the absurd result where a plaintiff simultaneously argues that the whole contract is valid, but that the court should ignore the arbitration provision which strips its power.

Two years later, we held that a party who disputes the formation of a contract may not be forced to arbitrate the issue of contract formation; otherwise "[p]arty A could forge party B's name to a contract *1177 and compel party B to arbitrate the question of the genuineness of its signature." *Three Valleys Municipal Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1140 (9th Cir. 1991). In *Three Valleys*, plaintiffs sued E.F. Hutton for substantial losses in their investment accounts. *Id.* at 1137. Defendant asserted an arbitration clause in a client agreement, while plaintiffs contended that the entire client agreement was not binding because the signor lacked authority to bind plaintiffs. *Id.* at 1138. The district court directed arbitration of the contract formation issue, and we reversed on the grounds that forcing the formation issue into arbitration would have held the plaintiffs to an arbitration clause upon which they might not have agreed. *Id.* at 1138-42.

The parties' briefing and the district court's careful analysis in the case at bar illuminate the conceptual tension that exists between *Teledyne* and *Three Valleys*. It might be argued that these two cases look in opposite directions: *Teledyne* compelled arbitration on the question of contract formation, *Three Valleys* reserved the formation question for the court. However, the court in *Three Valleys* distinguished its facts from those in *Teledyne* in an instructive way:

Teledyne is a rare case. In *Teledyne*, the plaintiff (1) asserted the validity of the underlying contract containing the arbitration clause by bringing a breach of contract action and (2) did not make an

independent challenge to the arbitration clause. The plaintiff thus had no ground on which to repudiate the arbitration agreement. As we explained in *Teledyne,* to allow the plaintiff to circumvent arbitration in these circumstances by bringing its claims in federal court would lead to an absurd result....

Three Valleys, 925 F.2d at 1142. This reading of *Teledyne* precisely fits the facts of the case presented by the appeal before us. Whether the facts of this case and of *Teledyne* are "rare" or not, we conclude that the general rule stated by the Supreme Court, reiterated recently in our *en banc* decision in *Nagrampa,* and previously implemented sensibly in *Teledyne,* should be followed.

[7] Here, Granite Rock brings a section 301(a) breach of contract action based on its alleged new CBA with Local 287, which includes an arbitration clause covering "[a]ll disputes arising under this agreement." This clause is broad enough to cover the dispute over contract formation, and Granite Rock does not make an independent challenge to the arbitration clause.[4] Granite Rock "thus ha[s] no

---

[4] While Granite Rock does not argue the arbitration clause is invalid in any way, it does argue briefly that the clause does not cover a dispute over formation. However, Granite Rock offers no support for a narrow reading of the arbitration clause here. Arbitration clauses are to be construed very broadly: "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *AT & T Techs., Inc. v. Comm. Workers,* 475 U.S. 643, 650, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (quoting *Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582-83, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960)). Because Granite

ground on which to repudiate the arbitration agreement." *Three Valleys,* 925 F.2d at 1142. Therefore, we must not allow Granite Rock to "circumvent arbitration in these circumstances by bringing its claim in federal court." *Id.*

Granite Rock contends that because Local 287 has contested the issue of contract formation, Local 287 has repudiated and *1178 waived the arbitration clause and should be estopped from asserting it, even as to questions of breach and damages. We summarily rejected that rationale in *Teledyne,* where the defendant denied the existence of the contract but asserted the arbitration clause. We stated: "Teledyne argues that Kone has no right to enforce the arbitration provision because it has denied that a valid contract exists. If accepted, this argument would produce an absurd result...." 892 F.2d at 1410. Local 287 timely raised the arbitration issue, and thus it is entirely acceptable for Local 287 to argue in the alternative that the agreement was never ratified, but even if it was, this case belongs in arbitration.

This outcome does not fun afoul of *Three Valleys.* The court there ultimately held that " 'a party cannot be required to submit [to arbitration] any dispute which he has not agreed so to submit.' " *Three Valleys,* 925 F.2d at 1142 (quoting *AT & T Technologies, Inc. v. Communications Workers,* 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)). In *Three Valleys* the party contesting contract formation also resisted arbitration, so it was

---

Rock is suing "under" the alleged new CBA, the arbitration clause is certainly "susceptible of an interpretation" that covers the dispute.

a permissible outcome to reserve the question of contract formation for the court.

[8] Here, both parties consented to arbitration; Granite Rock implicitly by suing under the contract containing the arbitration clause, and Local 287 explicitly by asserting the arbitration clause. Either might have had the right to a court determination of the formation issue had that right not been waived by asserting the validity of the contract. The holding of *Teledyne* is clear: Parties have no right to access the federal courts when they sue under agreements which, by their terms, remove the federal courts' power to hear the case unless they challenge the arbitration clause independently. *See Teledyne,* 892 F.2d at 1410.

Congress and the Supreme Court have declared a "national policy favoring arbitration." *Buckeye Check Cashing,* 546 U.S. at 443, 126 S.Ct. 1204 (citing the Federal Arbitration Act, 9 U.S.C. §§ 1-16). As courts have noted however, this policy is best served by limiting arbitrators' jurisdiction to those cases where the parties have actually agreed to arbitrate; "[t]he willingness of parties to enter into agreements that provide for arbitration of specified disputes would be 'drastically reduced' ... if a labor arbitrator had the 'power to determine his own jurisdiction ....'" *AT & T,* 475 U.S. at 651, 106 S.Ct. 1415 (quoting Cox, Reflections Upon Labor Arbitration, 72 Harv. L.Rev. 1482, 1509 (1959)). When the parties have both consented to arbitration there are no concerns about arbitrators imposing themselves upon parties. If a party sues under a contract containing a broad arbitration clause, logic dictates that the most reliable way of honoring the

parties' expectations is to enforce that arbitration clause from the outset unless the other party shows it never agreed to arbitrate.

When an alleged contract includes a broad arbitration clause, it is sensible to conclude that an arbitrator will hear challenges to contract formation or to the contract as a whole-provided that both parties have consented, in some fashion, to arbitration. *Teledyne* shows that one can consent to arbitration by suing under a contract that includes an applicable arbitration clause.

[9] The challenge here regards contract formation, Granite Rock does not challenge the arbitration clause independently, and both parties have consented to arbitration. As such, Granite Rock's claims against Local 287 should have been dismissed in favor of arbitration.

We AFFIRM the district court's judgment dismissing Granite Rock's claims *1179 against IBT, and we REVERSE and REMAND the district court's order denying Local 287's motion to arbitrate, with instructions that Granite Rock and Local 287 should be compelled to arbitrate their dispute in its entirety. Costs of IBT and of Local 287 shall be borne by Granite Rock.

[Dated, May 17, 2007].

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Granite Rock Company,

Plaintiff,

v.

International Brotherhood of Teamsters, Freight, C,

Defendant.

No. C 04-02767 JW

ORDER COMPELLING ARBITRATION

On May 3, 2007, the jury in this case found that (1) there was a vote taken on July 2, 2004 by the employees of Plaintiff Granite Rock's San Jose Concrete facility, who were members of Defendant Local 287, to approve or not to approve the Tentative Agreement and (2) a majority of Plaintiff's employees voted to approve the Tentative Agreement. (*See* Docket Item No. 321.)

The Court previously held that trial in this case would be limited to the single issue of ratification, and that the questions of whether Defendant violated the Tentative Agreement and if so, whether Plaintiff is entitled to damages, were to be determined by arbitration. (*See* Order Granting Defendant's Motion for Partial Summary Judgment

and Denying Defendant's Motion to Strike Plaintiff's Jury Demand, Docket Item No. 83.)

Since the jury decided the ratification issue in Plaintiff's favor, the Court now orders the Agreement. The Court STAYS this action pending arbitration. The Court will conduct a status conference on Monday, November 19, 2007 at 10 AM. The parties shall submit a status report to the Court by November 9, 2007.

Dated: May 17, 2007

/s
JAMES WARE
United States District Judge

[FILED MAY 03 2007
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT CALIFORNIA].

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Granite Rock Company, No. C 04-02767 JW

Plaintiff, VERDICT

v.

Teamsters Local 287,

Defendant.

WE THE JURY IN THE ABOVE-ENTITLED CASE FIND AS FOLLOWS:

QUESTION NO. 1

Do you find that Granite Rock proved by a preponderance of the evidence that there was a vote taken on July 2, 2004 by the employees of Granite Rock's San Jose Concrete facility, who were members of Local 287, to approve or not to approve the Tentative Agreement?

Answer:

YES X NO ___

[If your answer is "Yes," to the above question, then answer Question No. 2. If your answer is "No," skip to Question No. 3.]

QUESTION NO. 2

Do you find that Granite Rock proved by a preponderance of the evidence that on July 2, 2004, a majority of the employees votes to accept the Tentative Agreement?

Answer:

YES _X_ NO ____

[Proceed to Question No. 3].

QUESTION NO. 3.

Do you find that Granite Rock proved by a preponderance of the evidence that on July 2, 2004, Mr. George Netto notified Mr. Bruce Woolpert that the Tentative Agreement had been ratified by the members of Local 287?

Answer:

YES ____ NO _X_

[Have your presiding juror sign and date this verdict form. Send a note out to Courtroom Deputy Clerk Elizabeth Garcia that "the jury has reached a verdict." Place this verdict form in the special folder provided to you and have your presiding juror bring it with you when you are summoned into Court.]

DATED: May 3, 2007 /s

[Presiding Juror Signature]

Steven Chen

[Print Name of Presiding Juror]

[Dated, May 2, 2007].

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Granite Rock Company,

Plaintiff,

v.

Teamsters Local 287,

Defendant.

No. C 04-02767 JW

CLOSING INSTRUCTIONS

Members of the jury, now that you have heard all the evidence, it is my duty to instruct you on the law which applies to this case. Copies of these instructions have been made available for you to consult.

As I have instructed you, it is your duty to find the facts from all the evidence in the case. To those facts, you must apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. In deciding the case, you must not be influenced by any prejudices or sympathies. That means that you must decide the case solely on the evidence before you and according to the law. You will recall that you took an oath promising to do so at the beginning of the case.

You must follow all of my instructions. You must not single out some and ignore others; they are all important.

The evidence from which you are to base your verdict consists of the sworn testimony of witnesses, both on direct and cross-examination, regardless of who called the witness; the exhibits which have been received into evidence; and any facts to which the lawyers have agreed or stipulated.

If there is a conflict between the testimony of one or more witnesses and that of other witnesses, you must decide which testimony to believe and which testimony not to believe. You may disbelieve all or any part of any witness's testimony. In making that decision, you should take into account a number of factors including the following:

Was the witness able to see, or hear, or know the things about which that witness testified?

How well was the witness able to recall and describe those things?

What was the witness' manner while testifying?

Did the witness have an interest in the outcome of this case or any bias or prejudice concerning any party or any matter involved in the case?

How reasonable was the witness' testimony considered in light of all the evidence in the case?

Was the witness's testimony contradicted by what that witness said or did at another time, or by the testimony of other witnesses, or by other evidence?

In deciding whether or not to believe a witness, keep in mind that people sometimes forget things. You need to consider whether a contradiction is an innocent lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or with only a small detail.

The persuasiveness of the evidence presented by each side does not necessarily depend on the number of witnesses testifying on one side or the other. You must consider all the evidence in the case, and you may decide that the testimony of a smaller number of witnesses on one side has greater persuasiveness than that of a larger number on the other side.

During the trial, you heard testimony read from a deposition. As I instructed you during the trial, a deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath to tell the truth and lawyers for each party may ask questions. The questions and answers are recorded.

Deposition testimony is entitled to the same consideration and is to be judged, insofar as possible, in the same way as testimony given during the trial.

You have heard testimony from individuals who, because of education or experience, have become experts in a particular field. The law permits experts to state opinions about matters in the field of their expertise and they are permitted to state the reasons for those opinions.

Expert opinion testimony should be judged just like any other testimony. You may accept it j or reject it, and give it as much weight as you think it deserves. In deciding whether to believe an expert's testimony,

you should consider the expert's training and experience; the facts the expert relied on; and the reasons for the expert's opinion.

The verdict form will contain a series of questions about what happened between the parties in July 2004. Each question will call for a "Yes" or "No" answer. With respect to each question, Plaintiff Granite Rock has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove that each question should be answered "Yes."

You will recall, at the beginning of the case, I told you that a plaintiff has the burden of proving the case by a preponderance of the evidence. That means that a plaintiff has to produce evidence which, considered in the light of all the facts, leads you to believe that what the plaintiff claims is more likely true than not. To put it differently, if you were to give evidence which you find persuasive more weight than evidence that you do find persuasive; and if you put the evidence supporting what Granite Rock contends happened on one side of a scale and you put what Local 287 contends happened on the opposite side of the scale, the evidence supporting Granite Rock would have to make the scales tip on Granite Rock's side of the scales. If you evaluate the evidence and you find that the evidence is evenly balanced between the two sides, your verdict must be in favor of Local 287. If you evaluate the evidence and you decide that what Granite Rock claims is more likely true than not true, in other words if the scales tip on Granite Rock's side—even slightly, then your verdict should be rendered in favor of Granite Rock.

Evidence may be direct or circumstantial. Direct evidence is testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one can find another fact. You are to consider both direct and circumstantial evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

During the trial, I ordered that evidence be stricken from the record and that you disregard or ignore the evidence. That means that when you are deciding the case, you must not consider the evidence which I told you to disregard. There were instances during the case when I admitted evidence for a limited purpose and I instructed you to consider it only for that limited purpose. During your deliberations you may only consider such evidence for that limited purpose.

DISPUTED FACTS

The disputed facts in this case are (1) whether or not a proposed new collective bargaining agreement was ratified by members of Local 287; and (2) whether or not a representative of Local 287 notified a representative of Granite Rock that the proposed new collective bargaining agreement had been ratified.

STIPULATED FACTS

In a 21-paragraph document, the parties have stipulated to facts. You have been provided with a copy of the stipulation. You must regard those facts as established. I will refer to some of those

stipulated facts during the course of my instructions. The fact that I refer to some stipulated facts and not others is no indication that I regard any of the facts as more important. I will refer to the stipulated facts solely to instruct you on the law which you must follow in reaching your verdict.

AGENCY

In Paragraphs 6 and 7 of the stipulated facts, the parties have stipulated that George Netto is, and at all relevant times was, a Business Agent of Defendant Local 287, with authority to bind Defendant 287 with respect to collective bargaining agreements. Under the law, Local 287 is what is called "a principal" and Mr. Netto is "an agent." The "principal" is the person or entity who retains another, the "agent", to act on behalf of the principal and under the principal's directions and control such that the acts of the agent are binding on the principal. A labor union may appoint a business agent to negotiate a collective bargaining agreement and may give the agent authority to bind the labor union without further approval of the members of the union. Alternatively, the labor union may require that the agent present any proposed collective bargaining agreement to the members of the union to vote on, and authorize the agent to bind the labor union only if a majority of the union members vote in favor of the proposed agreement.

RATIFICATION

Paragraph 16 of the stipulated facts states: "The parties agreed that the collective bargaining agreement, for which a Tentative Agreement was reached, was conditioned on a ratification vote of the

San Jose Concrete bargaining unit members at 9:00 a.m., on July 2, 2004, before the parties would be required to fulfill its terms."

In the context of this case, "ratification vote" means a vote by the members of Local 287 approving the terms of the Tentative Agreement.

Under the labor laws of the United States, once an agreement is reached between an employer and a bargaining agent for a labor union, who has the authority to enter into a binding agreement, the labor union is obligated to execute a contract embodying that agreement. The labor laws of the United States do not require agents to obtain employee-ratification of a proposed collective bargaining before a binding agreement is reached. However, a labor union can restrict the authority of its bargaining agent and require that the agent present any proposed collective bargaining agreement for membership ratification. In addition, the parties who are negotiating a collective bargaining agreement are free to agree that ratification must take place before the parties are bound to the proposed agreement. Here, you must accept as fact that the representatives of Granite Rock and the representatives of Local 287 agreed that a vote of the members of Local 287 who worked at the San Jose Concrete facility ratifying the Tentative Agreement had to take place before the parties would be required to fulfill the terms of the Tentative Agreement.

On your verdict form, you will be asked to indicate if Granite Rock proved by a preponderance of the evidence that the members of Local 287 who worked

at the San Jose Concrete facility voted to ratify the Tentative Agreement on July 2, 2004.

Ratification in the context of this case means a majority voting to approve the entire Tentative Agreement.

NOTIFICATION

Under the labor laws of the United States, whenever a labor organization, through its authorized representative, notifies an employer that a tentative agreement has been ratified by the employees, that notice signifies acceptance of the rights and duties arising under the agreement, and in turn, a duty aries to execute a written contract embodying the terms of the tentative agreement. Notice of ratification can be given verbally. No particular words are required so long as what is said is that the employees approved the tentative agreement or words to that effect.

You have heard evidence that after the meeting on July 2, 2004, there may or may not have been contacts between representatives of Granite Rock and Local 287. Whether there was contact between the representatives and, if so, what was said, are questions of fact for you to decide. On your verdict form, you will be asked to indicate if you find that Granite Rock proved by a preponderance of the evidence that after the July 2, 2004 meeting of Local 287, a duly authorized representative of Local 287 notified a duly authorized representative of Granite Rock that the Tentative Agreement had been ratified by the employees.

ARGUMENT OF COUNSEL

I will now permit counsel for the parties to make their closing arguments. Counsel for plaintiffs will make a closing argument, followed by the closing argument by counsel for defendants. If he does not use all of his allotted time, counsel for plaintiff will be permitted a brief rebuttal argument and then I will have some brief additional instructions for you with respect to the conduct of your deliberations. Remember, statements of the attorneys are not evidence.

[FOLLOWING CLOSING ARGUMENT]
DUTY TO DELIBERATE

When you retire, you should elect one member of the jury as your presiding juror, That 11 person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you

can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

During the course of your deliberations you may take rest breaks or lunch breaks as you wish. Since we will be standing by pending your deliberations, please send us a note as to what your schedule will be. During any break, do not deliberate further upon the case. Cease all deliberations until your foreperson has brought you back into session with all of you present.

RETURN OF VERDICT

After you have reached unanimous agreement on a verdict, your presiding juror will fill in the form that will be given to you, sign and date it and advise the marshal or clerk of court outside your door that you are ready to return to the courtroom.

COMMUNICATION WITH COURT

If it becomes necessary during your deliberations to communicate with me, you will find a form for that purpose included in the material sent into the jury room. Any one of you may communicate with me by filling out the form. Bring it into my Chambers and give it to me or a member of my staff. No member of the jury should ever attempt to communicate with me except by a signed writing; and I will communicate with any member of the jury on anything concerning the case only in writing, or orally here in open court. Remember that you are not to tell anyone—including me—how the jury stands,

numerically or otherwise, until after you have reached a unanimous verdict or have been discharged.

Dated: May 2, 2007

/s
JAMES WARE
United States District Judge

EXHIBIT 1

The parties have agreed and stipulated that the following relevant facts are true and not disputed:

1. Plaintiff Granite Rock is, and at all times material to this action was, a California corporation engaged in the business of supplying ready mixed concrete for commercial use with its principal office at 350 Technology Drive, Watsonville, California 95077.

2. Plaintiff Granite Rock is an "employer" within the meaning of 29 U.S.C. § 152(2), employing employees in an industry affecting commerce, as defined in 29 U.S.C. § 152(7). At all relevant times in this matter, Plaintiff Granite Rock, a California corporation with an office and place of business in San Jose, California, has been engaged in the manufacture and distribution of concrete and related products. Within any and all relevant 12-month periods concerning this matter, Plaintiff Granite Rock, in the course and conduct of its business operations, has sold and shipped goods or provided services valued in excess of $50,000 directly to customers or business enterprises who themselves meet the jurisdictional requirements of the National Labor Relations Board.

3. Defendant Local 287 is a "labor organization" within the meaning of 29 U.S.C. § 152(5), representing employees in an industry affecting commerce, as defined in 29 U.S.C. § 152(7), in part, with respect to its representation of employees of Plaintiff Granite Rock.

4. Defendant Local 287 is, and at all times material to this action was, the elected bargaining representative of the employees engaged as drivers at Plaintiff Granite Rock's San Jose Concrete facility ("the bargaining unit" or "bargaining unit employees").

5. During most of the relevant time, twenty-one (21) employees were in the bargaining unit, including: Edward Alvemaz, Sedrick Amar, Douglas Coy, Brian Driscoll, Jesus Galaz, Kenneth Gallardo, George Hafely, Robert Harrell, Donald Hopf, Frank Ibarra, Clyde McIntyre, Timothy McReynolds, Tom Nelson, Christopher Nowak, Steve Nunez, Salomon Orozco, Tim Sanchez, Brian Sheridan, Ryan Vargas, Richard Walrod, and William Zielazowski.

6. George Netto is, and at all relevant times was, a Business Agent of Defendant Local 287, with authority to bind Defendant Local 287 with respect to collective bargaining agreements.

7. George Netto acted within the scope of his authority as a Business Agent of Defendant Local 287 at all relevant times.

8. Plaintiff Granite Rock and Defendant Local 287 have been parties to collective bargaining agreements at Plaintiff Granite Rock's San Jose Concrete facility since at least 1999.

9. The collective bargaining agreement between Plaintiff Granite Rock and Defendant Local 287 for the San Jose Concrete facility that was

in existence prior to the Tentative Agreement, expired by its terms on April 30, 2004.

10. On March 23, 2004, Plaintiff Granite Rock and Defendant Local 287 commenced negotiating for a collective bargaining agreement to succeed the expiring contract.

11. In early June 2004, employees engaged in a strike in support of the Union's negotiating position.

12. On the evening of Thursday,. July 1, 2004, Plaintiff Granite Rock and Defendant Local 287 met for collective bargaining agreement negotiations. This meeting continued into the morning of Friday, July 2, 2004.

13. The following individuals were present during the negotiation session that began on the evening of Thursday, July 1, 2004: Bruce Woolpert, President of Plaintiff Granite Rock; Shirley Ow, Plaintiff Granite Rock's Director of Human Resources; George Netto, Defendant Local 287's business agent; Chris Nowak and Brian Driscoll, employees of Plaintiff Granite Rock and members of the bargaining unit.

14. On July 2, 2004, Plaintiff Granite Rock presented a last, best and final offer to Defendant Local 287.

15. On July 2, 2004, Plaintiff Granite Rock and Defendant Local 287 reached a tentative agreement (the "Tentative Agreement") on the

terms of the new collective bargaining agreement.

16. The parties agreed that the collective bargaining agreement, for which a Tentative Agreement was reached, was conditioned on a ratification vote of the San Jose Concrete bargaining unit members at 9:00 a.m. on July 2, 2004 before the parties would be required to fulfill its terms.

17. Plaintiff Granite Rock manifested a present intent to be bound by the terms of the Tentative Agreement.

18. At about 9:00 a.m. on Friday, July 2, 2004, Defendant Local 287 held a meeting with the San Jose Concrete facility's bargaining unit employees.

19. All of the employees who were members of the San Jose Concrete bargaining unit were present at the 9:00 a.m. meeting on July 2, 2004.

20. On July 2, 2004, Defendant Local 287 took down its picket signs and ceased picketing Plaintiff Granite Rock's San Jose Concrete facility.

21. (510) 915-6430 is Rome Aloise's cell phone number.

[Dated, February 16, 2007].

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Granite Rock Company, Plaintiff, v. Teamsters Local 287, Defendant.	NO. C 04-02767 JW **ORDER DENYING LABOR UNION'S MOTION TO COMPEL ARBITRATION OF BIFURCATED ISSUE OF WHETHER THE COLLECTIVE BARGAINING AGREEMENT WAS RATIFIED**

I. INTRODUCTION

This case involves a dispute between a plaintiff-employer ("Granite Rock") and a defendant labor union ("Local 287") over Local 287's alleged refusal to order bargaining unit employees to return to work after Local 287's and Granite Rock's representatives negotiated a new collective bargaining agreement ("CBA") on July 2, 2004. Local 287 contends that its refusal was permissible because the new CBA was not ratified by its members at a time relevant to the litigation. Granite Rock alleges that the CBA was ratified on July 2, 2004, and the employees'

continued strike past that date represents a breach of the CBA.

Granite Rock brought this civil action against Local 287 for breach of contract. Due to the putative CBA's arbitration clause, the Court established a bifurcated proceeding: (1) the Court will determine whether the CBA was ratified and (2) if yes, the Court will compel arbitration of Granite Rock's damages claim. Although Local 287 has repeatedly requested arbitration, it maintains the CBA was not ratified.

Presently before the Court is Local 287's current Motion to Compel Arbitration, which cites additional authority to compel arbitration. This Order finally resolves the issue of whether the Court or an arbitrator must decide the threshold ratification issue.[1] The Court conducted a hearing on January 29, 2007. Based on the papers submitted to date and the oral arguments of counsel, the Court finds the additional authorities cited by Local 287 unpersuasive. The Court DENIES Local 287's Motion to Compel Arbitration pending the Court's ruling on the issue of whether the CBA was ratified at a time relevant to this litigation.

---

[1] The reasoning in this Order is based on the following premise. Neither party advances, nor does the language of the prior (1999-2004) CBA seem to support that the CBA and its included arbitration provision applied on or after July 2, 2004. (*See* First Amended Complaint Ex. A, Docket Item No. 5.)

II. BACKGROUND

The parties do not dispute the following:

Granite Rock supplies ready mixed concrete for commercial use. Its bargaining unit employees are represented by the International Brotherhood of Teamsters, Local 287. Between March 1, 1999 and April 30, 2004, Granite Rock and Local 287 were parties to a CBA. In anticipation of the CBA's expiration, Granite Rock and Local 287 commenced negotiations on a new CBA. While negotiations were in progress, the earlier CBA expired, and the bargaining unit employees went on strike. In the early morning hours of July 2, 2004, representatives for both sides agreed on the terms of a new CBA. A Local 287's representative stated that he would present the proposed CBA to the bargaining unit employees.

Granite Rock alleges the following:

> The bargaining unit employees voted to approve the new CBA on July 2, 2004. (Third Amended Complaint for Damages 20, hereafter, "TAC," Docket Item No. 164.) Later that day, Local 287's representative contacted Granite Rock to state that the new CBA was ratified. *Id.* On July 6, 2004, Local 287 told Granite Rock that its members would not return to work until Granite Rock signed a Back-to-Work Agreement that guaranteed amnesty for Local 287's members and for Granite Rock's employees in facilities at three other counties to whom separate CBAs

> applied. (TAC 24.) On August 22, 2004, the bargaining unit employees again approved the new CBA. (TAC 27.) The strike continued in violation of the CBA's terms until September 13, 2004. (TAC 28.)

Local 287 alleges the following:

> After Local 287's representative stated that he would present the tentative CBA to the bargaining unit employees, the representatives continued with their meeting. (Answer of Defendant Teamsters Local 287 to Second Amended Complaint 7, hereafter, "Answer," Docket Item No. 111.) Before the meeting was concluded, the representatives agreed that a "back-to-work" agreement would be negotiated; Granite Rock presented a draft of a "back-to-work" proposal; Local 287's representative rejected the proposal and stated that Local 287 would provide a counterproposal later that day; and Local 287's representatives made clear that there would be no ratification vote by the strikers until the parties concluded a "back-to-work" agreement. *Id.*

On July 9, 2004, Granite Rock filed this damages action pursuant to the Labor Management Relations Act, 29 U.S.C. § 185(a), alleging that Local 287's members' refusal to return to work was a breach of the new CBA. (*See* Docket Item No. 1.) Local 287 pleads as affirmative defenses that (1) the new CBA

was not ratified by Local 287's members at any time relevant to this action and (2) its alleged conduct for which Granite Rock seeks damages—striking in breach of a no-strike clause—presents a dispute subject to the grievance and arbitration provisions of the CBA presently in effect between the parties, making the Court's assertion of jurisdiction inappropriate. (Answer at 4-5.) Presently before the Court is Local 287's Motion to Compel Arbitration.

III. DISCUSSION

The Court previously bifurcated this case. (See Order Granting Defendant's Motion for Partial Summary Judgment and Denying Defendant's Motion to Strike Plaintiff's Jury Demand, Docket Item No. 83.) The Court held that (1) it would first decide the issue of contract ratification and (2) it would refer any remaining issues to arbitration. *Id.* Granite Rock demanded a jury trial on the issue of contract ratification.

Local 287 now moves the Court to refer even the threshold issue of contract ratification to arbitration. Local 287 contends that (1) since Granite Rock's position is that the CBA was ratified and (2) the putative CBA undisputedly contains an arbitration agreement that covers allegedly unlawful strikes, (3) whether ratification occurred on July 2, 2004 must also be determined by an arbitrator. (Notice of Motion and Motion to Compel Arbitration in Light of New Ninth Circuit En Banc Opinion at 2-4, hereafter, "Motion," Docket Item No. 213.) Granite Rock opposes referral of the ratification question to arbitration, contending that Local 287's claim of nonratification is tantamount to a claim that there was no CBA in existence. Granite Rock contends

that case law mandates that a court must decide, under these circumstances, whether a contract existed between the parties. (Plaintiff's Opposition to Defendant's Motion to Compel Arbitration in Light of New Ninth Circuit En Banc Opinion; Request for Sanctions at 6-7, hereafter, "Opposition," Docket Item No. 219.) Each of the parties cite case law not previously brought to the Court's attention. The discussion below confirms the Court's decision to proceed with the bifurcated trial of the ratification issue.

A. When Order to Compel Arbitration May Be Issued

The Supreme Court has articulated two fundamental principles of arbitrability within the labor context. First, since arbitration is a function of contract law, a court may only compel arbitration of a dispute which the parties have previously agreed to arbitrate. *AT&T Technologies, Inc. v. Comm. Workers*, 475 U.S. 643, 648 (1986). Second, whether a CBA mandates arbitration of a particular grievance is a judicial determination. *Id.* at 649. Thus, if the parties dispute the existence of an agreement to arbitrate, the court resolves this dispute before referring remaining questions to arbitration. The Court considers Local 287's claim that the CBA was not ratified is equivalent to a claim that there is no agreement to arbitrate.

B. Effect of Labor Union's Charter

"Ratification" is a term with multiple legal meanings. First, ratification describes the act of a principal that gives legal effect to an act of an unauthorized agent. *See Quality Foods, Inc. v.*

Holloway Assoc. Prof. Eng'rs & Land Surveyors, Inc., 852 N.E. 2d 27, 33 (2006). Second, ratification refers to an entity's consent to be bound by an act or position of an authorized representative. *Canadian Lumber Trade Alliance v. United States*, 425 F. Supp. 2d 1321, 1362 (2006).

Where a labor union's charter requires a ratification vote, a CBA is not binding on the union until ratified. *See, e.g., N.L.R.B. v. Holly-General Co.*, 305 F.2d 670, 671 n.2 (9th Cir. 1962). Local 287 is a local of the International Brotherhood of Teamsters ("International"). The Constitution of the International provides as follows:

> Agreements shall be accepted by a majority vote of those members involved in negotiations and voting, or a majority of such members shall direct further negotiations before a final vote on the employer's offer is taken, as directed by the Local Union Executive Board. During negotiations, the Local Union Executive Board may order a secret ballot strike vote to be taken and when, in the judgment of the Local Union Executive Board, an employer has made a final offer of settlement, such offer must be submitted to the involved membership for secret ballot vote as hereinafter provided. When the final offer has been rejected in accordance with this Section, it shall constitute authorization for a strike at such time and under such conditions as

> the Local Union Executive Board may determine.

Int'l Teamsters Const., Art. XII, § 2. Local 287's bylaws provide as follows:

> Whenever a collective bargaining agreement is about to be negotiated . . . the principal executive officer shall call a meeting at which the membership shall determine and authorize the bargaining demands to be made. The Local Union Executive Board shall determine whether such meeting shall be limited to the members in a particular division, craft or place of employment.
>
> Ratification of agreements or amendments shall be subject to vote in the same manner as provided in connection with bargaining as set for Section 25(a) in the case of area-wide, conference-wide or national agreements in accordance with the Constitution and rules adopted by such bargaining group, except where the General Executive Board has directed the Local Union to refrain from executing such agreement, no proposed agreement shall be considered ratified by any vote until and unless it is specifically approved by the General Executive Board.
>
> Where a final contract proposal has been reduced to writing at the time it is

> to be submitted for vote, copies of the written proposal shall be made available to the affected membership.

The International's Constitution and Local 287's bylaws permit the interpretation that Local 287's membership must ratify a CBA before it is binding on Local 287. Granite Rock does not contend otherwise. It simply disputes Local 287's claim that the CBA was not ratified on July 2, 2004.

C. Effect of Labor Union's Claim That CBA Was Not Ratified on Date of Alleged Breach

The heart of the issue is whether the Court or an arbitrator must determine whether the CBA was ratified. The parties cite a series of cases addressing the division of decision-making labor between courts and arbitrators. Pursuant to the holding of *Three Valleys Municipal Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136 (9th Cir. 1991), the Court finds that it must decide the ratification issue before it refers the remainder of the case to arbitration.

1. *Three Valleys*

In *Three Valleys*, several public entities opened securities accounts with defendant. 925 F.2d at 1137. On opening of a securities account, defendant required the account holder to sign a "Client Agreement," which contained an arbitration clause. *Id.* at 1138. An individual signed client agreements on behalf of the public entities. *Id.* The public entities filed suit in federal court alleging that defendant's wrongful conduct had caused them substantial investment losses. *Id.* Defendant moved to compel arbitration, to which the public entities

objected on the grounds that the client agreements were void, as the signatory-individual did not have the authority to bind them. *Id.*

The public entities filed suit in federal court, alleging that defendant's wrongful conduct had caused them substantial investment losses. *Id.* Defendant moved to compel arbitration. *Id.* The public entities objected to arbitration, contending, inter alia, that the individual who signed the client agreement did not have the authority to bind them. *Id.* The district court ruled that whether or not the signatory had the ability to bind the public entities should be submitted to arbitration, but declined to order arbitration of all the claims. *Id.* The matter came to the Ninth Circuit on cross-appeals. *Id.*

The Ninth Circuit held that the district court should have determined the issue of whether the signatory had the authority to bind the public entities:

> If the dispute is within the scope of an arbitration agreement, an arbitrator may properly decide whether a contract is "voidable" because the parties have agreed to arbitrate the dispute. But, because an "arbitrator's jurisdiction is rooted in the agreement of the parties," a party who contests the making of a contract containing an arbitration provision cannot be compelled to arbitrate the threshold issue of the existence of an agreement to arbitrate. Only a court can make that decision.

Id. at 1140-41 (internal citations omitted). The court distinguished two earlier cases addressing the

division of decision-making power between courts and arbitrators: *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) and *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404 (9th Cir. 1989).

i. *Prima Paint*

In *Prima Paint*, plaintiff contracted to purchase defendant's paint business. 388 U.S. at 397. Approximately three weeks later, the parties signed a consulting agreement for defendant to provide consulting services to plaintiff in connection with plaintiff's business operations. *Id.* The consulting agreement provided for arbitration of "[a]ny controversy or claim arising out of or relating to this Agreement." *Id.* at 398. When plaintiff's first payment under the consulting agreement became due, it placed the payment in escrow, accusing the defendant of fraudulent inducement of contract. *Id.* Defendant responded by serving a "notice of intent to arbitrate." *Id.* Plaintiff filed a federal civil action seeking rescission of the consulting agreement on the basis of fraudulent inducement and an injunction against defendant from proceeding with the arbitration. *Id.* at 399. Defendant cross-moved to stay the court action pending arbitration of plaintiff's fraudulent inducement claim. *Id.* The lower courts found in favor of immediate arbitration.[2] *Id.* at 399-400.

The Supreme Court affirmed the decision to compel arbitration for two reasons. First, the language of

---

[2] These rulings were based on the United States Arbitration Act of 1925. *Id.* at 400. In this case, the Federal Arbitration Act applies. There is no difference between the provisions relevant to this discussion.

the arbitration clause was sufficiently broad to encompass the plaintiff's fraudulent inducement claim. *Id.* at 406. Second, the plaintiff, who was the party resisting arbitration, claimed that the entire contract, rather than the arbitration clause specifically, was fraudulently induced. *Id.* at 403-04. The Supreme Court distinguished fraudulent inducement claims specifically directed towards the arbitration clause, holding that a federal court could adjudicate those. *Id.*

The Ninth Circuit in *Three Valleys* read the holding of *Prima Paint* as limited to challenges seeking to avoid or rescind a contract. The court held that *Prima Paint* did not apply to a challenge to the existence of a contract to which a party claims never to have agreed:

> A contrary rule would lead to untenable results. Party A could forge party B's name to a contract and compel party B to arbitrate the question of the genuineness of its signature. Similarly, any citizen of Los Angeles could sign a contract on behalf of the city and Los Angeles would be required to submit to an arbitrator the question of whether it was bound to the contract, even if its charter prevented it from engaging in any arbitration.

925 F.2d at 1140. The *Three Valleys* court characterized its issue — whether a signatory had the authority to bind its putative principal — as a challenge to the very existence of a contract. As such, the issue was for the court to decide. *Id.* at 1144.

ii. *Teledyne*

In *Teledyne*, the plaintiff was defendant's exclusive United States distributor of hydraulic breakers pursuant to a signed agreement. 892 F.2d at 1406. After the agreement ended, the parties began negotiating a new agreement. *Id.* Negotiations culminated with both parties' representatives signing an exclusive distributorship agreement in April 1986. *Id.* The agreement's front page stated, "DRAFT (to be finalized by [defendant's] legal department)." *Id.* Neither party took further action towards finalizing the agreement. *Id.* The draft agreement provided that any dispute between the parties concerning the agreement would be resolved by arbitration. *Id.*

In 1987, plaintiff filed a civil action, which was removed to federal court.[3] *Id.* at 1407-1410. Plaintiff claimed that during the course of negotiating the distributorship agreement, defendant was secretly negotiating for the sale of its hydraulic breaker division to another company, and it ultimately did sell the division. *Id.* at 1406. Defendant claimed that a "draft agreement" could not be the basis for a breach of contract claim. Defendant nonetheless moved to dismiss the lawsuit pursuant to the Federal Arbitration Act, contending that the dispute was subject to the distribution agreement's arbitration clause. Plaintiff opposed dismissal, pointing to defendant's contention that no valid contract existed. *Id.* at 1410. The district court

---

[3] Although there were subject matter jurisdiction issues considered on appeal, those issues do not impact the relevance of *Teledyne* court's analysis of the arbitration issue to this case.

granted defendant's motion to dismiss, and plaintiff appealed.

The Ninth Circuit held that dismissal of plaintiff's claims pursuant to the Federal Arbitration Act was proper. The alternative, according to the court, would produce an absurd result: "The district court could grant [plaintiff] relief on the contract only if it finds that the 1986 Draft was finalized. But if the 1986 draft was final and valid, the arbitration provision would be valid as well since it has not been the subject of any independent challenge. And if the arbitration provision was valid, [plaintiff's] claims would not belong in federal court in the first place." *Id.* Thus, the Ninth Circuit held, "The federal courts have avoided such absurdities by requiring that cases be submitted to arbitration unless there is a challenge to the arbitration provision which is separate and distinct from any challenge to the underlying contract. The teaching of *Prima Paint* is that a federal court must not remove from the arbitrator's consideration a substantive challenge to a contract unless there has been an independent challenge to the making of the arbitration clause itself." *Id.* As to defendant, the court held, "[Defendant] has argued that the 1986 Draft was never finalized. It has attacked the contract as a whole without making an 'independent challenge' to the arbitration provision. It has thus not waived its right to have an arbitrator determine whether the 1986 Draft was finalized." *Id.*

A broad reading of *Teledyne* is that any contract-related issue which is not an independent challenge to the arbitration clause itself is arbitrable. This reading would mean that the signatory issue in

Three Valleys was arbitrable. The *Three Valleys* court rejected this possibility, holding that Teledyne should not be read broadly enough to delegate all contract issues to the arbitrator. 925 F.2d at 1141-42. The court found that *Teledyne* was a "rare case." That is, in *Teledyne*, the plaintiff implicitly asserted by suing for breach of contract that the underlying contract (which contained an arbitration clause) was valid. The *Teledyne* plaintiff also did not make an independent challenge to the contract's arbitration clause. Thus, the plaintiff lacked a ground to repudiate its prior agreement to arbitrate, and the court would not allow it to circumvent arbitration by bringing its claims in federal court. In contrast, the *Three Valleys* plaintiffs denied the existence of the contracts containing the arbitration provisions, thus implicitly contesting any agreement to arbitrate within the contracts. *Id.* The *Three Valleys* court concluded, "To require the plaintiffs to arbitrate where they deny that they entered into the contracts would be inconsistent with the 'first principle' of arbitration that 'a party cannot be required to submit [to arbitration] any dispute which he has not agreed so to submit." *Id.* at 1142 (quoting *AT&T Technologies*, 475 U.S. at 648.)

2. The Nagrampa Case

The parties also dispute the effect of *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257 (9th Cir. 1996). Plaintiff, a franchisee of defendant, signed an agreement requiring arbitration of any dispute that arose out of or in relation to the agreement. 469 F.3d at 1265. She unilaterally terminated the franchise agreement after two years, and defendant initiated arbitration to recover fees owed. *Id.* Rather than

participate in arbitration, plaintiff filed suit in state court alleging, *inter alia*, that the franchise agreement's arbitration provision was invalid as an unconscionable contract of adhesion pursuant to the California Consumer Legal Remedies Act. Plaintiff's complaint did not seek to have the entire franchise agreement invalidated or declared unconscionable. *Id.* at 1266.

The Ninth Circuit, *en banc*, reaffirmed the well-established principle that the arbitrability of a particular dispute is a threshold issue to be decided by the courts. *Id.* at 1268 (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002); *AT&T Techs., Inc. v. Comm. Workers of Am.*, 475 U.S. 643, 649 (1986)). Federal law provides that arbitration agreements are valid, irrevocable, and enforceable, barring legal or equitable grounds for revocation. *Id.* (citing 9 U.S.C. § 2.) A court may revoke an arbitration agreement for, inter alia, fraud, duress, or unconscionability. *Id.* (citing *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

The *Nagrampa* court followed the Supreme Court's long-established dichotomy with respect to arbitration agreements, which was recently reaffirmed in *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S.Ct. 1204 (2006). In *Buckeye*, the Court divided challenges to arbitration agreements into two categories: (1) challenges to the validity of an agreement to arbitrate and (2) challenges to the contract as a whole, whether a challenge to the entire agreement or a challenge to a portion of the contract that renders the entire contract invalid. *Id.* at 1208. The Court held that the courts resolve challenges specific to the validity of an arbitration

clause, but that arbitrators consider challenges to the validity of entire contracts, where the contract contains an arbitration clause.

The Ninth Circuit, then, applied the reasoning of *Buckeye* to unconscionable agreements in *Nagrampa*:

> [W]hen the crux of the complaint challenges the validity or enforceability of the agreement containing the arbitration provision, then the question of whether the agreement, as a whole, is unconscionable must be referred to the arbitrator. When the crux of the complaint is not the invalidity of the contract as a whole, but rather the arbitration provision itself, then the federal courts must decide whether the arbitration provision is invalid and unenforceable under 9 U.S.C. § 2 of the FAA.

469 F.3d at 1263.

Thus, *Nagrampa* considers whether a court or an arbitrator should decide a challenge to the enforceability of a contract that was undisputedly formed. It does not control as to a scenario where a contracting party contends that, due to lack of ratification, it did not enter into the contract in the first place.

3. Applicability to This Case

The current positions of the parties are curious. Local 287 contends that the CBA was not ratified

and thus, was not in force at the time of the alleged breach. However, Local 287 is willing to waive its right to a judicial determination of the ratification issue and submit the case to arbitration. (Motion at 3.) Granite Rock contends that the CBA was ratified, which implicitly means that the arbitration clause was in effect on the date of the alleged breach. However, Granite Rock requests the Court, not an arbitrator, to determine whether the CBA was ratified. (Opposition at 6-7.)

The caselaw establishes the following framework for arbitrability determinations in the Ninth Circuit. If the parties dispute the threshold issue of contract formation, *AT&T* and *Three Valleys* stand for the proposition that the court must determine whether a contract was formed before it can compel the parties to arbitrate the dispute. If, alternatively, the parties had a signed agreement and the signatories had undisputed authority to bind the parties, but the parties now contest the validity or enforceability of part or all of that agreement, *Nagrampa, Teledyne, Prima Paint* and *Buckley* establish the following dichotomous framework. Challenges to the contract as a whole — e.g. unconscionability or fraudulent inducement of contract — are determined by an arbitrator. On the other hand, challenges specifically to the agreement's arbitration clause are resolved by the court. This dichotomy vindicates the principle described in *AT&T*: no party may be compelled to arbitrate a disagreement unless it previously agreed to arbitration.

Here, Local 287 contends that the CBA was never ratified by its membership. The International's charter and Local 287's bylaws potentially state that

a CBA is not binding on Local 287 until it is ratified by a vote of Local 287's members (an issue on which the Court will entertain argument at trial). Thus, Local 287's contention is, in essence, that the parties never formed a CBA.[4]

Since the resolution of the ratification issue is inextricably tied to the existence of any contract to arbitrate, the Court reaffirms its decision to decide this question in the first stage of this bifurcated 3 proceeding.

D. Request for Sanctions

Granite Rock moves the Court to sanction Local 287 for making this motion in light of the i Court's denial of a previous motion that raised the same issue. (Opposition at 7-9.) This motion 7 implicates the same issues previously addressed by the Court in an earlier motion made by Local 287. (*See* Docket Item Nos. 48, 83.) However, this motion directed the Court's attention to different authorities than those previously presented for consideration. The issue of the arbitrability of a claim that a contract was not ratified is a difficult legal issue worthy of careful judicial review. The Court finds that Local 287 s motion was made in good faith. Granite Rock's motion for ! sanctions is denied.

---

[4] This case is distinguishable from *Teledyne*, in which the parties undisputedly signed a draft agreement which merely needed finalizing by the defendant's legal department. 892 F.2d at 1406. Indeed, there was evidence in *Teledyne* that the defendant (the party seeking to avoid the contract) had regarded the contract as creating enforceable rights and obligations. *Id.* In this case, there is no evidence that Local 287 signed the putative CBA, whether by ratification of its members or otherwise.

IV. CONCLUSION

The Court DENIES Defendant's Motion to Compel Arbitration. The trial in this case shall proceed as previously scheduled. The parties shall appear for a Final Pretrial Conference on April 9, 2007 at 3 p.m.

Dated: February 16, 2007

/s
JAMES WARE
United States District Judge

[Dated, January 17, 2007].

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

GRANITE ROCK COMPANY,

Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, FREIGHT, CONSTRUCTION, GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 287; and INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Defendants.

Case No. 04 2767 JW

AMENDED FINAL JUDGMENT AND CERTIFICATE OF APPEALABILITY

Pursuant to the Court's December 13, 2006 Order Certifying Appeal Pursuant to Rule 54(b) (see Docket Item No. 212), the Court enters final judgment in favor of Defendant International Brotherhood of Teamster, and against Plaintiff Granite Rock Company.

For the reasons stated in the Court's December 13, 2006 Order, the Court has expressly determined there is no just reason for delay. Therefore, the Court certifies for appeal the case between Plaintiff

Granite Rock and Defendant International Brotherhood of Teamsters.

Dated: January 12, 2007

/s

The Honorable James Ware
United States District Judge

[Dated, December 13, 2006].

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Granite Rock Company, Plaintiff, v. International Brotherhood of Teamsters, Local 287, et al., Defendants.	NO. C 04-02767 JW ORDER CERTIFYING APPEAL PURSUANT TO RULE 54(b)

I. INTRODUCTION

Plaintiff Granite Rock Company ("Plaintiff") brought this suit against Defendants International Brotherhood of Teamsters ("IBT") and its Local 287 for breach of contract and tortious interference with contract under Section 301 of the Labor Management Relations Act ("LMRA").[1] On October 5, 2006, the Court granted Defendant IBT's Motion to Dismiss, holding that a claim for tortious

[1] The factual allegations of this case are provided at greater length in the Court's October 5, 2006 Order Granting Defendant International Brotherhood of Teamsters' Motion to Dismiss With Prejudice (hereafter, "Order," Docket Item No. 192.)

interference with contract against a non-signatory to the contract does not lie under Section 301 of the LMRA. Before the Court is Plaintiff's Motion for Certification. Plaintiff requests the Court to certify its appeal of the Order either as a final judgment that is directly and immediately appealable under Federal Rule of Civil Procedure 54(b) or as an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The Court found the motion appropriate for submission without oral arguments. *See* Civ. L.R. 7-1(b). Based on the papers submitted to date, the Court GRANTS Plaintiff's Motion for Certification.

II. STANDARDS

In a multi-claim or multi-party action, the district court may direct entry of a final judgment for purposes of appeal if (1) the court expressly determines that there is no just reason for delay and (2) the court expressly directs the entry of judgment. Fed. R. Civ. P. 54(b). The judgment must apply to one or more, but fewer than all of the claims or parties in the case. *Id.* In applying Rule 54(b), the district court must "strike a balance between the undesirability of more than one appeal in a single action and the need for making review available in multiple-party or multiple-claim situations at a time that best serves the need of the litigants." *Good v. Ohio Edison Co.*, 104 F.3d 93, 95 (6th Cir. 1997). To determine whether certification is proper, appellate courts consider (1) the district court's evaluation of the factors favoring a Rule 54(b) judgment, including the interrelationship of the claims and (2) the trial court's assessment of the equities, including delay or prejudice to any party. *Gregorian v. Izvestia*, 871 F.2d 1515, 1519 (9th Cir. 1989).

The Ninth Circuit traditionally took a restrictive view of the circumstances under which Rule 54(b) certification was appropriate. *See Morrison-Knudsen Co. v. Archer*, 655 F.2d 962, 965 (9th Cir. 1981). However, the Ninth Circuit has more recently held, "The present trend is towards greater deference to a district court's decision to certify under Rule 54(b). *Morrison-Knudsen* . . . is an outdated and overly restrictive view of the appropriateness of Rule 54(b) certification." *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 798 (9th Cir. 1991). Rather, the present approach is a "pragmatic" approach that "focus[es] on severability and efficient judicial administration." *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1525 (9th Cir. 1987).

III. DISCUSSION

A. Severability

Plaintiff contends that certification is proper because the issue to be appealed is severable from the remainder of the case. (Plaintiff's Motion for Certification Under F.R.C.P. 54(b) or, in the Alternative, 28 U.S.C. § 1292(b) of the Court's October 5, 2006 Order Granting Defendant International Brotherhood of Teamsters' Motion to Dismiss with Prejudice at 4-6, hereafter, "Motion," Docket Item No. 196.) Severability exists for Rule 54(b) purposes when the claims to be certified can be separated both factually and legally from the remaining matters. *Continental Airlines, Inc.*, 819 F.2d at 1525. Here, legal severability exists because the issue for appeal concerns whether a plaintiff can assert a claim for tortious interference with contract against a non-signatory to the contract. In contrast, the only remaining issue pending before the Court is

whether a valid contract was formed between the two parties to the putative contract, Plaintiff and Local 287. Moreover, factual severability exists because different allegations underlie Plaintiff's claims against IBT and Local 287. Plaintiff alleges that Local 287 entered into and subsequently breached a valid contract. In contrast, Plaintiff alleges that IBT "engaged in acts that were intended to induce, support, and encourage a strike that breached the collective bargaining agreement between Granite Rock and Local 287." (Motion at 5.) The Court finds that the issue to be appealed is legally and factually severable from the remainder of the case still pending before the Court.

B. Mootness and Judicial Economy

IBT's principal argument against certification is that Plaintiff's claim for tortious interference against it may be rendered moot. (International Brotherhood of Teamsters' Opposition to Plaintiff's Motion for Certification Under F.R.C.P. 54(b) or, in the Alternative, 28 U.S.C. § 1292(b), of the Court's October 5, 2006 Order Granting Defendant International Brotherhood of Teamsters' Motion to Dismiss with Prejudice at 6-9, hereafter, "Opposition," Docket Item No. 207.) In the Ninth Circuit, certification is appropriate "even if subsequent trial proceedings might obviate the need for an appeal," where "eliminating issues and parties from a case justifies the entry of final judgment on a claim." *Cadillac Fairview/Cal., Inc. v. United States*, 41 F.3d 562 (9th Cir. 1994)

If a jury finds that a contract was not formed between Plaintiff and Local 287, Plaintiff will be bound by that determination and will be unable to

maintain a claim against IBT for tortious interference with contract, rendering its appeal moot. Conversely, if the jury finds that a contract was formed between Plaintiff and Local 287, Plaintiff will then have to appeal the Court's October 2006 Order which held that a Section 301 claim for tortious interference with contract does not lie. If Plaintiff is successful, Plaintiff will have to return to district court to litigate its tortious interference with contract claim. IBT will then likely argue that it is not bound by the jury's previous determination that a contract existed, and Plaintiff may be forced to relitigate that issue. Under this scenario, not only would Plaintiff suffer prejudice due to lengthy delay, but the interest of judicial economy would not be furthered.

Trial on the question of whether Plaintiff and Local 287 formed a valid contract is presently scheduled for April 24, 2007. (*See* Docket Item No. 209.) If Plaintiff prevails at trial on the question of whether a collective bargaining agreement existed, it will be well-situated to pursue its claim against IBT, as the seminal issue will already have been presented to the Ninth Circuit on appeal. Similarly, IBT will benefit from a speedier resolution of the issue on appeal. If, conversely, Plaintiff loses at trial, the appeal can be withdrawn The Court finds that the best means to balance the parties' interests is to grant Plaintiff's motion for certification pursuant to Rule 54(b), but to decline to stay the trial between

Plaintiff and Local 287 on the question of whether there is a contract.[2]

IV. CONCLUSION

The Court GRANTS Plaintiff's Motion for Certification.

Dated: December 13, 2006

/s

JAMES WARE
United States
District Judge

[2] Since the Court finds Rule 54(b) certification appropriate, the Court need not reach the question of whether certification under 28 U.S.C. § 1292(b) is appropriate.

[Dated, October 5, 2006].

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Granite Rock Company,	NO. C 04-02767 JW
Plaintiff,	INTERLOCUTORY JUDGMENT
v.	
International Brotherhood of Teamsters, Freight C, et al.,	
Defendants.	

Pursuant to the Court's October 5, 2006 Order Granting Defendant International Brotherhood of Teamsters' Motion to Dismiss With Prejudice, judgment is entered in favor of Defendant International Brotherhood of Teamsters, against Plaintiff Granite Rock Company.

Dated: October 5, 2006

/s
JAMES WARE
United States
District Judge

[Dated, October 5, 2006].

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Granite Rock Company, Plaintiff, v. International Brotherhood of Teamsters, Freight C, et al., Defendants.	NO. C 04-02767 JW **ORDER GRANTING DEFENDANT INTERNATIONAL BROTHERHOOD OF TEAMSTERS' MOTION TO DISMISS WITH PREJUDICE**

I. INTRODUCTION

Plaintiff Granite Rock Company ("Plaintiff") brings this suit for breach of contract and tortious inducement with contract under Section 301 of the Labor Management Relations Act ("LMRA"). Plaintiff suffered financial loss after its bargaining unit employees participated in a strike that was allegedly facilitated by Defendant International Brotherhood of Teamsters ("Defendant IBT").

Before the Court is Defendant International Brotherhood of Teamsters' Motion to Dismiss Plaintiff's Third Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The Court

conducted a hearing on September 11, 2006. Based upon the papers submitted to date and the oral arguments of counsel, the Court GRANTS Defendant International Brotherhood of Teamsters' Motion to Dismiss because an action for tortious interference with contract does not lie under

II. BACKGROUND

The Plaintiff alleges the following:

Between March 1, 1999 and April 30, 2004, Plaintiff and Freight, Construction, General Drivers, Warehousemen, and Helpers, Local No. 287 ("Defendant Local 287") were parties to a Collective Bargaining Agreement ("CBA") that defined the terms of employment for the bargaining unit employees at Plaintiff's San Jose Concrete facility. (Third Amended Complaint for Damages, hereafter, "TAC," ¶ 10, Docket Item No. 164.) For three months beginning in March 2004, Plaintiff and Defendant Local 287 took part in negotiations on a new CBA. (TAC ¶ 11.) During this time, the Plaintiff submitted two Final Offers to Defendant Local 287, on April 30, 2004 and May 21, 2004, and both were rejected. (TAC ¶ 12.) Instrumental to these negotiations were George Netto ("Netto"), Business Representative for Defendant Local 287, and Rome Aloise ("Aloise"), the Administrative Assistant to the General President of Defendant IBT. (TAC ¶¶ 12, 13.)

Aloise participated in negotiations on at least five instances as a representative of Defendant IBT: (1) instructing Local 287 that Plaintiff's April 30, 2004 Final Offer was not acceptable; (2) providing information to Plaintiff concerning health plan arrangements that Local 287 had agreed to with

other employees; (3) preparing a document for Local 287 comparing the agreements for the Teamsters at two of Plaintiff's facilities; (4) proposing to Plaintiff that he attend negotiations between Plaintiff and any Teamsters Local before the Teamsters Joint Council would approve strike sanctions; (5) participating in collective bargaining with other unions whose members were participating in strikes against Plaintiff's facilities. (TAC ¶ 13.)

In early June 2004, the existing CBA between Plaintiff and Defendant Local 287 expired, and the bargaining unit employees at Plaintiff's San Jose Concrete facility commenced on strike. (TAC ¶ 15.) Negotiations between Plaintiff and Defendant Local 287 recommenced on July 1, 2004, and at 4 AM on July 2, 2004, the parties agreed on a four-year CBA, covering the period between May 1, 2004 and April 30, 2008, which substantially mirrored the expired CBA except as noted in Plaintiff's July 2, 2004 Final Offer. (TAC ¶¶ 16, 18.) At that time, Netto told Plaintiff's President and Chief Executive Officer Bruce Woolpert that he would present the CBA to the bargaining unit employees that morning at 9 AM, recommend their approval, and that the pickets would be removed. (TAC ¶ 17.) The agreement as reached on July 2, 2004 included a no-strike clause. (TAC ¶ 18.)

The bargaining unit employees approved the new CBA on July 2, 2004. (TAC ¶ 20.) On Monday, July 5, 2004, several individuals acting on behalf of Defendant Local 287, and Aloise, acting on behalf of Defendant IBT, called bargaining unit employees to encourage or instruct them not to return to work. (TAC ¶ 23.) On July 6, 2004, Defendant Local 287

told Plaintiff that its members would return to work only after Plaintiff signed a Back-to-Work Agreement that guaranteed amnesty for Defendant Local 287 and its members, for the Teamsters Locals, and for Plaintiff's employees at facilities in three other counties to whom separate CBAs applied. (TAC ¶ 24.) The proposed CBA received by Plaintiff contained language that would have shielded Defendant IBT from liability, at the insistence of Aloise. (TAC ¶ 25.)

On August 22, 2004, the bargaining unit employees again approved the July 2, 2004 CBA. (TAC ¶ 27.) The strike continued in violation of the CBA's terms until September 13, 2004. (TAC ¶ 28.) Aloise involved himself in the strike by encouraging employees to continue, giving speeches to the employees and union representatives, writing letters to representatives of various local unions, and representing to the Plaintiff's Director of Human Resources, Shirley Ow, that he was authorized by Defendant IBT to settle the strike. (TAC ¶ 30.) Plaintiff's employees who were members of Defendant Local 287 received strike benefits from Defendant IBT for remaining away from work, after the strike had been ongoing for a given number of days. (TAC ¶ 32.)

On July 9, 2004, the Plaintiff filed this action for breach of contract and tortious interference with contract, naming Local 287 and IBT as Defendants. (*See* Docket Item No. 1.) Plaintiff filed its Third Amended Complaint on June 8, 2006. (*See* Docket Item No. 164.) Plaintiff's two Claims for Relief are both based on asserted violations of Section 301(a) of the Labor Management Relations Act, 29 U.S.C. §

185(a). Plaintiff's First Claim for Relief is asserted against Defendant Local 287 for breach of contract. (TAC 37-41.) Plaintiff's Second Claim for Relief is asserted against Defendant IBT for tortious interference or inducement of breach of contract. (TAC 42-49.)

Defendant IBT moves for dismissal of Plaintiff's Third Amended Complaint without leave to amend pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Defendant IBT's Notice of Motion and Motion to Dismiss, hereafter, "Motion," at 1, Docket Item No. 164.)

Plaintiff contends that Section 301(a) of the LMRA has been interpreted broadly by the United States Supreme Court and the Ninth Circuit and that the Ninth Circuit has previously permitted non-signatory parties and non-contract causes of action in Section 301 claims. (Plaintiff Granite Rock's Memorandum of Points & Authorities in Opposition to Defendant IBT's Motion to Dismiss, hereafter, "Opposition" at 4, Docket Item No. 178.)

III. STANDARDS

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed against a defendant for failure to state a claim upon which relief can be granted against that defendant. Dismissal may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistrer v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990); *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530-, 533-534 (9th Cir. 1984). For purposes of evaluating a motion to dismiss, the court "must presume all factual

allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). Any existing ambiguities must be resolved in favor of the pleading. *Walling v. Beverly Enters.*, 476 F.2d 393, 396 (9th Cir. 1973).

However, mere conclusory allegations couched in factual allegations are not sufficient to state a cause of action. *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *see also McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988). A complaint should not be dismissed under Rule 12(b)(6) unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Moore v. City of Costa Mesa*, 886 F.2d 260, 262 (9th Cir. 1989). Courts may dismiss a case without leave to amend if the plaintiff is unable to cure the defect by amendment. *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000).

The Federal Rules of Civil Procedure have established a liberal standard of "notice pleading." A plaintiff's factual pleading is sufficient if it contains "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2) & (e)(1). The Supreme Court has explained that the Federal Rules "do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (quoting Fed. R. Civ. P. 8(a)(2)). The Supreme Court has reaffirmed the

liberal notice-pleading requirements by stating that a prima facie case is "an evidentiary standard, not a pleading requirement." *Swierkiewicz v. Sorema*, 534 U.S. 506, 510 (2002).

IV. DISCUSSION

Defendant IBT challenges the validity of Plaintiff's Second Claim for Relief for tortious inducement of breach of contract under Section 301(a) of the LMRA on the grounds that Section 301(a) does not encompass tort-based claims for relief against non-parties. (Motion at 1.)

Section 301(a) of the LMRA ("Section 301(a)") provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (2006). To establish a claim based on Section 301(a) in the Ninth Circuit, Plaintiff's suit must concern a claim of violation of a contract that was formed "between" an employer and a labor organization or "between" labor organizations. *Alvarez v. Erickson*, 514 F.2d 156, 161 (9th Cir. 1975).

Here, the Plaintiff has alleged that Defendant Local 287, a labor organization, violated a contract that it formed with the Plaintiff, an employer. The Plaintiff alleges damages based on two claims for relief: Defendant Local 287's breach of contract and Defendant IBT's tortious inducement of that breach. The Court must make findings regarding the terms of the CBA and their alleged breach to resolve each of Plaintiff's claims for relief. Jurisdiction over Defendant IBT is proper if Section 301(a) supports the Court's jurisdiction over tort claims against non-parties to the CBA.

Defendant IBT contends that Plaintiff's tort claim is not legally cognizable under the LMRA. (Motion at 1.) There exists a circuit split on the question of whether Section 301(a) encompasses claims for tortious interference with a CBA against non-signatories to that agreement. *Int'l Union, United Mine Workers of America v. Covenant Coal Corp.*, 977 F.2d 895, 897 (4th Cir. 1992). The majority of circuits, including the First, Second, Fourth, Fifth, Sixth, Seventh, and Tenth, have either held explicitly that tortious interference claims do not lie under Section 301(a), or have impliedly reached this conclusion by holding that Section 301(a) suits against non-signatories to a contract are disallowed. *Bowers v. Ulpiano Casal, Inc.*, 393 F.2d 421, 424 (1st Cir. 1968); *Aacon Contracting Co. v. Ass'n of Catholic Trade Unionists*, 276 F.2d 958 (2nd Cir. 1960), affg and adopting 178 F. Supp. 129, 130 (E.D.N.Y. 1959); *Int'l Union, United Mine Workers v. Covenant Coal Corp.*, 977 F.2d 895, 897 (4th Cir. 1992); *Carpenters Local Union No. 1846 v. Pratt-Farnsworth*, 690 F.2d 489, 501 (5th Cir. 1982); *Service, Hosp., Nursing Home & Public Employees*

Union, Local No. 47 v. Comm. Prop. Servs., Inc., 755 F.2d 499, 506 (6th Cir. 1985); *Loss v. Blankenship*, 673 F.2d 942, 947-48 (7th Cir. 1982); *United Food & Comm. Workers Union, Local No. 1564 v. Quality Plus Stores Inc.*, 961 F.2d 904, 906 (10th Cir. 1992). The Ninth Circuit has not yet ruled definitively on this issue, but two district courts in this circuit have also held that there is no Section 301(a) claim for tortious interference with contract. *Teamsters Local Union No. 117 v. Sysco Food Serv. of Seattle, Inc.*, 2005 WL 1643890, at *7 (W.D. Wa. July 11, 2005); *Wynn v. National Broadcasting Company, Inc.*, 234 F. Supp. 2d 1067 (C.D. Cal. 2002).

The leading case permitting plaintiffs to bring Section 301(a) tortious interference claims is under the federal common law of labor contracts is *Wilkes-Bane Publishing Co. v. Newspaper Guild, Local 120*, 647 F.2d 372, 380-81 (3rd Cir. 1981). The Third Circuit concluded that Section 301(a) jurisdiction attaches where the court will need to interpret a CBA to resolve a claim, as CBAs are governed by federal law in fulfillment of the Congressional intent of uniformity of obligation in labor contracts in or affecting interstate commerce. *Id.* at 379-80. The court held, however, that labeling a remedy as "tort" or "contract" had no bearing on jurisdiction. *Id.* at 381. The Eleventh Circuit briefly joined the Third Circuit in permitting federal tortious interference claims. *Local 472 v. Georgia Power Co.*, 684 F.2d 721, 725 (11th Cir. 1982). Subsequently, the Eleventh Circuit ruled that Section 301 claims were only permitted against contract signatories, thus de facto refusing to permit claims for tortious interference with contract (which can only be

brought against non-signatories).[1] *Xaros v. U.S. Fid. & Guar. Co.*, 820 F.2d 1176, 1181 (11th Cir. 1987). At present, only the Third Circuit permits Section 301(a) tortious interference claims.

Plaintiff contends that the Ninth Circuit cited *Wilkes-Barre* favorably in deciding that Section 301 remedies may mirror traditional tort remedies. (Opposition at 15, citing *Rozay's Transfer v. Local Freight Drivers*, 850 F.2d 1321, 1335 (9th Cir. 1988)). It is correct that the Ninth Circuit cited with approval *Wilkes-Barre*'s conclusion about the irrelevance of the tort or contract label attached to a *remedy*. *Id.* However, the permissibility of "tort-like, 'make-whole'" remedies in the Ninth Circuit does not speak to whether or not a *cause of action* for tortious interference is permitted. The Court declines to read the existence of a claim for tortious interference of contract into the Ninth Circuit's mere observation that the Third Circuit permitted a Section 301 claim for tortious interference with a CBA. *Id.*

Plaintiff contends that the Court should find a Section 301 cause of action for tortious interference because "state law claims for tortious interference that Granite Rock could bring against the IBT for its interference and inducement of an unlawful strike would likely be preempted by Section 301...Federal court adjudication is needed, without which there would be no forum, resulting in an 'unsettling result,

---

[1] For instance, the first element of a California state law claim for tortious interference with contract is the existence of a valid contractual relationship between the plaintiff and a third party. *Milne Employees Ass'n v. Sun Carriers, Inc.*, 960 F.2d 1401, 1411 (9th Cir. 1991) (citing *Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 791 P.2d 587 (Cal. 1990)).

in that plaintiff is left actionless...'" (Opposition at 24, citing *Wynn*, 234 F. Supp. 2d at 1120.)) However, Defendant IBT correctly contends:

> To the extent it is accurate to say there is a "gap" in the Taft-Hartley Act because it fails to provide Granite Rock with a remedy against the International, there is no basis for plaintiff to contend that the gap created by Congress was inadvertent. Congress has often chosen to create particular—but limited—bundles of rights and remedies in numerous areas of labor law...federal law is replete with instances where Congress has injected itself into a field, preempting state law causes of action, but has also severely circumscribed the rights and remedies available under the federal statute.

(Defendant International Brotherhood of Teamsters' Reply in Support of Motion to Dismiss at 4-5, Docket Item No. 186.)

The Court follows the majority of circuits in holding that a suit for tortious interference with contract does not lie under LMRA Section 301(a).

V. CONCLUSION

The Court GRANTS Defendant IBT's Motion to Dismiss Plaintiff's Second Claim for Relief with prejudice.

Dated: October 5, 2006

/s
JAMES WARE
United States District Judge

[Dated, November 21, 2005].

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

GRANITE ROCK COMPANY,

Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, FREIGHT, CONSTRUCTION, GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL 287 (AFL-CIO),

Defendant

NO. C 0402767 JW

ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S JURY DEMAND

I. INTRODUCTION

Plaintiff Granite Rock Company ("Plaintiff") brings this action against Defendant International Brotherhood of Teamsters, Freight, Construction, General Drivers, Warehousemen and Helpers, Local No. 287 ("Defendant") pursuant to Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), for disputes arising out of alleged contract violations. Plaintiff alleges that there was a ratified

collective bargaining agreement between the parties, and that Defendant violated the agreement by engaging in an unlawful strike.

Defendant now moves for partial summary judgment. The purpose of the motion "is to enable the Court to determine in advance of trial whether, as Defendant contends, particular issues raised by the not heard at trial by the Court." Motion, p.1 Specifically, Defendant contends that "trial of this case must be limited to the single question of whether the collective bargaining agreement that Plaintiff claims to have been violated was in existence at the time the alleged violation occurred, and that the potential issues as to whether Defendant violated the agreement and the amount of damages, if any to be awarded, must be referred to arbitration if the agreement is found by the Court to have been in existence at the relevant time." *Id.* Defendant also moves to strike Plaintiff's jury demand

A hearing on Defendant's motions was set for November 14, 2005. However, this Court finds it appropriate to take the motions under submission without oral argument pursuant to Civil Local Rule 7-1(b). Based on the arguments advanced by counsel in their briefs and on the pleadings, Defendant's motion for partial summary judgment is GRANTED, and Defendant's motion to strike Plaintiff's jury demand is DENIED.

II. BACKGROUND

A. Factual Background

Plaintiff Granite Rock is a California company engaged in the business of supplying ready mixed concrete for commercial use. Defendant Local 287 is a voluntary, unincorporated association, commonly known as and doing business as a "labor organization" within the meaning of 29 U.S.C. § 185. Defendant represents certain Granite Rock employees at its San Jose facility, and is the collective bargaining representative for employees engaged as drivers at the San Jose facility.

From March 1, 1999 to April 30, 2004 Plaintiff and Defendant were parties to a collective bargaining agreement. (Amended Complaint, hereinafter "Am. Compl.," ¶ 6.) Preliminary negotiations for a new agreement commenced in March 2004. Negotiations continued throughout April and May without success. In early June 2004, after the agreement's expiration, bargaining unit employees at the San Jose facility went on strike. (Am. Compl. ¶ 8.) Plaintiff alleges that after further negotiations, the parties reached an agreement at 4:00 a.m. on Friday, July 2, 2004 on terms for a new collective bargaining agreement covering the period from May 1, 2004 to April 30, 2008 ("New Agreement"). (Am. Compl. ¶ 8.) In addition, Plaintiff claims that George Netto, Defendant's Business Representative, called to inform Plaintiff that the New Agreement was ratified later that same day by a vote of all the union employees. (Am. Compl. ¶ 10.)

Defendant denies that the New Agreement was ever ratified. Instead, Defendant asserts that ratification

was conditioned on the parties first agreeing on a "Back to Work Agreement." Plaintiff, on the other hand, alleges that the parties agreed to discuss a "Back to Work Agreement" at a later date, and that any such "Back to Work Agreement" would be subject to the grievance procedure set forth in the New Agreement. The New Agreement included a no-strike clause and a compulsory grievance and arbitration procedure for the settlement of "any disputes" arising under the agreement. (Am. Compl. ¶ 11.)

On July 5, 2004, Defendant allegedly violated the New Agreement by calling union members and instructing them not to return to work. (Am. Compl. ¶ 13.) Plaintiff alleges that Defendant informed Plaintiff that its members would not return to work until Plaintiff executed a "Back to Work Agreement" guaranteeing amnesty for its employees and for employees of Plaintiff's other facilities in three counties covered under separate collective bargaining agreements with different unions. (Am. Compl. ¶ 13.) Plaintiff also alleges that Defendant violated the New Agreement by not participating in the compulsory grievance and arbitration provision set forth in the agreement and by engaging in an unlawful strike. (Am. Compl. ¶¶ 13-14.) The strike has now ended. However, Plaintiff still seeks damages resulting from the alleged violation of the New Agreement.

B. Procedural Background

On July 9, 2004, Plaintiff filed the instant complaint against Defendant for damages from the allegedly unlawful strike. Shortly thereafter, Plaintiff amended the complaint to include injunctive relief,

and brought a motion for temporary restraining ("TRO") to: (1) Enjoin and restrain Defendant from "[t]hreatening, causing, directing, assisting or participating in any strike, slowdown or other concerted refusal to perform work in violation of the collective bargaining agreement between the parties, or in any other manner interrupting the normal operations of Plaintiff over any dispute, complaint or grievance with Plaintiff concerning the discipline and/or amnesty on striking employees which is resolvable under the grievance and arbitration provisions of the Parties' collective bargaining agreement"; and (2) to "withdraw any outstanding orders or directions to employees of Plaintiff that said employees should engage in a cessation of work because of any dispute over the application or interpretation of the Collective Bargaining Agreement and to advise all employees and prospective employees of Plaintiff represented by Defendant not to engage in any of the acts described above." Plaintiff's Application, p.2.

The Court determined that Plaintiff's application for a temporary restraining order could be consolidated with a trial on the merits pursuant to Rule 65, Fed.R.Civ.P., and proceeded to hear the case on its merits with respect to whether the collective bargaining agreement had been ratified. Following the receipt of testimony, the Court found that the New Agreement had not been ratified; dismissed the complaint; and entered judgment.

Plaintiff next filed a motion for a new trial based upon newly discovered evidence, which the Court granted. Thereafter, Defendant moved for judgment on the pleadings under Federal Rule of Civil

Procedure 12(c), or, in the alternative, for a stay of these proceedings pending arbitration of the dispute. The Court denied Defendant's motion because of the underlying factual dispute regarding the alleged ratification of the New Agreement. *See* Order Denying Defendant's Motion for Judgment on the Pleadings, Docket Item No. 57.

Defendant now moves for partial summary judgment under Federal Rule of Civil Procedure 56 to resolve the scope of the arbitration clause contained in the New Agreement. The arbitration provision in the New Agreement states that "[a]ll disputes arising under this agreement shall be resolved in accordance with the [Federal Mediation and Conciliation Service for Mediation if the Union and the Employer are unable to resolve the dispute]." (Decl. of Duane B. Beeson, Ex. B at 18.) Defendant contends that assuming that the Court finds ratification, the New Agreement requires arbitration of the remaining issues, namely breach and damages. Plaintiff, however, contends that all issues are to be decided in this judicial proceeding, not arbitration.

Defendant also moves to strike Plaintiff's jury demand under Federal Rule of Civil Procedure 39(a), on the grounds that Plaintiff's demand was untimely, or alternatively, that Plaintiff waived its right to jury trial. Plaintiff opposes the motion.

III. STANDARDS

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to

judgment as a matter of law." Fed. R. Civ. P. 56(c). The purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." *Celotex v. Catrett*, 477 U.S. 317, 323-324 (1986).

The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323. If this burden is met, the moving party is then entitled to judgment as a matter of law when the non-moving party fails to make a sufficient showing on an essential element with respect to which the non-moving party bears the burden of proof at trial. *Id.* at 322-23.

The non-moving party "must set forth specific facts showing that there is a genuine issue for trial. " Fed. R. Civ. P. 56(e). The non-moving party cannot defeat the moving party's properly supported motion for summary judgment simply by alleging some factual dispute between the parties. To preclude the entry of summary judgment, the non-moving party must bring forth material facts, i.e., "facts that might affect the outcome of the suit under the governing law . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986).

The court must draw all reasonable inferences in favor of the non-moving party, including questions of credibility and of the weight to be accorded particular evidence. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520 (1991) (citing *Anderson*, 477 U.S. at 255); *Matsushita*, 475 U.S. at 588; *T.W. Elec. Serv. v. Pac. Elec. Contractors*, 809 F.2d 626, 630 (9th Cir. 1987). It is the court's responsibility "to determine whether the 'specific facts' set forth by the nonmoving party, coupled with undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence." *T.W. Elec. Serv.*, 808 F.2d at 631. "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587.

IV. DISCUSSION

Defendant's motion for summary judgment is based upon the arbitration provision of the New Agreement and is relatively straightforward: if the Court finds that the New Agreement was ratified, the remaining issues, namely the alleged breach of the New Agreement and damages, are subject to arbitration pursuant to the terms of the New Agreement. Plaintiff contends, however, that: (1) Defendant has repudiated the arbitration provision by arguing that the New Agreement was not ratified; (2) Defendant is judicially and equitably estopped from asserting

the arbitration provisions; (3) Defendant has waived its right to arbitrate; and (4) bifurcation of ratification issues from contract violation and damages issues is inefficient and inappropriate.

A. Repudiation

Citing to *California Trucking Ass'n. v. Bhd. of Teamsters & Auto Truck Drivers, Local 70*, 679 F.2d 1275 (9th Cir. 1982), Plaintiff contends that Defendant repudiated the arbitration provision in the New Agreement because: (1) Defendant made an untimely assertion of the arbitration claims, and (2) denied the binding effect of the New Agreement. Plaintiff's Opposition, p.3.[1]

What occurred before the court in *California Trucking Ass'n*, however, is materially distinct from what occurred before this Court. In *California Trucking Ass'n*, the union did not assert a right to arbitration in a timely manner. *California Trucking Ass'n* 679 F.2d at 1284. Instead, the union "argued before the court that it preferred to have the action determined in a speedy trial." *Id.* The union also delayed over three years before moving to dismiss

---

[1] In general, "when a contract calls for arbitral resolution of questions arising under the collective bargaining agreement, the equitable defense of repudiation is a matter to be decided in arbitration, not in court." *California Trucking* at 1282. *See also Local Union No. 370 of the Int'l Union of Operating Eng'rs v. Morrison-Knudsen Co., Inc.*, 786 F.2d 1356, 1358 (9th Cir. 1986) ("It is well-settled law that the question of whether repudiation [of a collective bargaining agreement] has occurred must normally be submitted to the arbitrator."). However, a district court has jurisdiction to resolve a repudiation defense based on conduct occurring before it. *California Trucking* at 1283.

the lawsuit for failure to exhaust contractual grievance procedures, and delayed an additional year before requesting a stay. *Id.* Moreover, the court in *California Trucking Ass'n* found that "neither the motions for dismissal nor the motion for stay alleged that the provisions in the . . . agreement it now relies upon required arbitration." Further, the court in *California Trucking Ass'n* found that the union had "substantially invoked the litigation machinery by submitting several motions for summary judgment on the merits." *Id.*

In the instant case, although Defendant opposed Plaintiff's motion for TRO by arguing that there was no ratification of the New Agreement, and that even if there was ratification, there was nothing to arbitrate,[2] Defendant did not engage in the kind of dilatory tactics that the union in *California Trucking Ass'n* did. Defendant has consistently argued that the arbitration provision applies to the issues of breach of contract and damages. Defendant's answer specifically asserts the affirmative defense that the alleged breach of contract and damages are issues subject to the grievance and arbitration provisions of the collective bargaining agreement. (Defendant's Answer, Docket Item No. 43 at 3:14-20.) At the TRO hearing, Defendant argued that there was nothing to arbitrate, and not, as Plaintiff contends, that the arbitration provision does not apply. Further, in each of Defendant's substantive motions to date, Defendant has asked the Court to find that the arbitration provision applies to the issues of breach

---

[2] Non-performance of an alleged union contract, even when unjustified, is not *per se* a repudiation of the arbitration provision contained therein. *California Trucking Ass'n*, 679 F.2d at 1283.

of contract and damages. Therefore, the Court finds that Defendant has not repudiated the arbitration provision contained in the New Agreement.

B. Judicial and Equitable Estoppel

Citing to *New Hampshire v. Maine*, 532 U.S. 742 (2001), Plaintiff contends that Defendant is judicially and equitably estopped from asserting the arbitration provision of the New Agreement. In *New. Hampshire*, the Supreme Court identified several factors that typically inform the decision whether to apply the doctrine of judicial estoppel in a particular case: (1) whether the party's later position is "clearly inconsistent" with its earlier position; (2) whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Id.* at 750-751.

Plaintiff contends that the Court should apply the doctrine of judicial estoppel because: (1) Defendant denied the binding effect of the New Agreement; (2) Defendant succeeded at the temporary restraining order stage in arguing that the New Agreement had not been ratified; and (3) Defendant derives an unfair advantage by being able to effectively choose what forum it would prefer to have adjudicate the liability and damages of its violation of the New Agreement's no-strike clause.

Plaintiff's argument is unpersuasive for a number of reasons. First, the law allows Defendant to assert both that the union contract does not exists, and alternatively that if it does exist, the arbitration provision applies. *California Trucking Ass'n, v. Bhd. of Teamsters & Auto Truck Drivers. Local 70, supra,* at 1283-1284. Furthermore, as discussed previously in Section "A" to this Order, Defendant has consistently argued that the arbitration provision applies to the issues of breach of contract and damages.

As for Plaintiff's contention of forum shopping, this judicial forum was selected by Plaintiff, not Defendant. Therefore, the Court rejects Plaintiff's judicial and equitable estoppel theories.

C. Waiver

Plaintiff contends that Defendant waived its right to arbitrate because of undue delay in bringing the matter to arbitration, and that Plaintiff was prejudiced from the delay. As the Court has explained in Section "A" of this Order, Defendant did not unduly delay making its arbitration. The Court granted Plaintiff's Motion for a New Trial on January 25, 2005, and Defendant immediately filed an answer on February 17, 2005, asserting the compulsory arbitration provision as an affirmative defense. Defendant's Answer to Amended Complaint, Docket Item No. 43. Because there was no undue delay, the Court need not reach the prejudice issue.

D. Efficiency and Appropriateness

Plaintiff contends that a bifurcation of ratification issues from contract violation and damages issues is

inefficient and inappropriate. Plaintiff's contention is unpersuasive. In *Drake Bakeries. Inc. v. Local 50, Am. Bakery*, 370 U.S. 254 (1962), the Supreme Court found that under our federal labor policy, courts have "every reason to preserve the stabilizing influence of the collective bargaining contract" where the arbitration provision includes all disputes, did not exclude claims for strikes, and contemplated submission of grievances. *See Id.* at 258. The arbitration provision in the instant case includes all disputes. Plaintiff does not contend that the arbitration provision excludes claims for strikes, and the submission of grievances to an arbitrator was clearly contemplated in the agreement. Therefore, assuming ratification, the Court has every reason to preserve the stabilizing influence of the New Agreement, and refer the appropriate issues to arbitration.

E. Jury Demand

Defendant contends that Plaintiff's jury demand was untimely. Under Federal Rule of Civil Procedure 38(b), "any party may demand a trial by jury of any issue triable of right by a jury by . . . serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue." Fed. R. Civ. P. 38(b). The last pleading directed to the issue of a jury trial was Defendant's Answer to Amended Complaint, Docket Item No. 43. *See Pacific Fisheries Corp. v. HIH Cas. & Gen. Ins.. Ltd.*, 239 F.3d 1000, 1002. In *Pacific Fisheries Corp.*, the jury demand was untimely because the jury demand was filed more than ten days after the defendant had

answered the complaint. *Id.* In our case, Defendant's Answer to Amended Complaint was filed on February 17, 2005, and Plaintiff made a demand for a jury trial on February 24, 2005. Therefore, Plaintiff's jury trial demand was timely.

Nevertheless, relying upon *White v. McGuiness*, 903 F.2d 699 (9th Cir. 1990), Defendant contends that Plaintiff waived its right to a jury trial on the ratification issue. The *White v. McGuiness* case, however, is factually distinct from the instant case. In holding that the plaintiff had knowingly waived his right to a jury trial, the *White* court found that the objecting party was on notice that the trial court was planning to adjudicate the dispositive issues of fact, *and* chose to argue his case *fully* before the district judge. In the instant case, Plaintiff did not choose to argue its case fully before the Court. What Plaintiff chose to argue before the Court without a jury was whether a temporary restraining order should issue against Defendant for violating the Labor Management Relation Act, and *not*, as Defendant contends, the issue of whether the collective bargaining agreement had been ratified. Moreover, the Court has an obligation to indulge every reasonable presumption against the waiver of the jury right. *See Pradier v. Elespuru*, 641 F.2d 808, 811 (9th Cir. 1981).

V. CONCLUSION

For the reasons set forth above, Defendant's motion for partial summary judgment is GRANTED, and Defendant's motion to strike is DENIED.

Dated: November 18, 2005

/s
JAMES WARE
United States
District Judge

[Dated, July 19, 2005].

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Granite Rock Company, Plaintiff, v. International Brotherhood of Teamsters, Freight, Construction, General Drivers, Warehousemen and Helpers, Local No. 287, Defendant	NO. C 04-02767 JW **ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS, OR, IN THE ALTERNATIVE, FOR A STAY PENDING ARBITRATION**

I. INTRODUCTION

Plaintiff Granite Rock Company ("Plaintiff or "Granite Rock") brings this action against Defendant International Brotherhood of Teamsters, Freight, Construction, General Drivers, Warehousemen and Helpers, Local No. 287 ("Defendant" or "Local 287") pursuant to Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), for disputes arising out of alleged contract violations. Plaintiff alleges that there was a ratified collective bargaining agreement between the parties, and that Defendant

violated the agreement by engaging in an unlawful strike. Defendant now moves for judgment on the pleadings under Rule 12(c), or, in the alternative, for a stay of proceedings pending arbitration of the dispute.

A hearing on Defendant's motion was set for July 11, 2005. However, this Court finds it appropriate to take the motion under submission without oral argument pursuant to Civil Local Rule 7-1(b). Based on the arguments advanced by counsel in their briefs and on the pleadings, Defendant's motion is DENIED.

II. BACKGROUND

Plaintiff Granite Rock is a California company engaged in the business of supplying ready mixed concrete for commercial use. Defendant Local 287 is a voluntary, unincorporated association, commonly known as and doing business as a "labor organization" within the meaning of 29 U.S.C. § 185. Local 287 represented certain Granite Rock employees at its San Jose facility, and is the collective bargaining representative for employees engaged as drivers at the San Jose facility.

From March 1, 1999 to April 30, 2004 Plaintiff and Defendant were parties to a collective bargaining agreement. (Amended Complaint, hereinafter "Am. Compl.," ¶ 6.) Preliminary negotiations for a new agreement commenced in March 2004. Negotiations continued throughout April and May without success. In early June 2004, after the agreement's expiration, bargaining unit employees at the San Jose facility went out on strike. (Am. Compl. ¶ 8.)

After further negotiations, Plaintiff alleges the parties reached an agreement at 4:00 am on Friday, July 2, 2004 on terms for a new collective bargaining agreement covering the period from May 1, 2004 to April 30, 2008. (Am. Compl. ¶ 8.) In addition, Plaintiff claims that George Netto, Local 287's Business Representative, called to inform Plaintiff that the agreement was ratified later that same day by a vote of all the union employees. (Am. Compl. ¶ 10.) Defendant denies that the agreement was ever ratified.

Plaintiff also alleges that the parties agreed to maintain the same contract language as the previous collective bargaining agreement, except where noted in the July 2, 2005 agreement. (Am. Compl. ¶ 9.) The relevant portions to this action, Plaintiff alleges, are Section 19 ("Discharge / Suspension"), Section 20 ("Grievance Procedure") and Section 22 ("Strikes and Lockouts"). Plaintiff alleges that the parties agreed to discuss a "Back to Work Agreement" at a later date, and that any such agreement would be subject to the grievance procedure set forth in the July 2, 2005 collective bargaining agreement. That agreement included a no-strike clause and a compulsory grievance and arbitration procedure for the settlement of any disputes "arising under" the agreement. (Am. Compl. ¶ 11.)

Plaintiff alleges that Defendant violated the July 2, 2005 collective bargaining agreement by calling union members and instructing them not to return to work. Plaintiff alleges that Defendant wanted "guaranteed amnesty" for its employees and employees at Plaintiff's other facilities in three counties covered by separate collective bargaining

agreements. Plaintiff alleges that Defendant violated the agreement by not participating in the compulsory grievance and arbitration provision set forth in the ratified collective bargaining agreement and by engaging in an unlawful strike. (Am. Compl. ¶¶ 13-14.) Plaintiff also alleges that it is willing to participate in the grievance and arbitration proceedings provided in the collective bargaining agreement. (Am. Compl. ¶ 17.) The strike has now ended. However, Plaintiff still prays for damages from the violation of the alleged collective bargaining agreement.

Local 287 has moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), or, in the alternative, for a stay of these proceedings pending arbitration of the dispute. Local 287 argues that Plaintiff's alleged claim is subject to arbitration rather than judicial resolution. Plaintiff responds that a jury, not an arbitrator, must decide the dispute.

III. STANDARDS

"After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings." FED. R. Civ. P. 12(c). For purposes of a 12(c) motion, the allegations of the non-moving party are accepted as true, while the allegations of the moving party which were denied are assumed false. *See Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1990). Judgment on the pleadings is only proper when the moving party clearly establishes that no material issue of fact remains and that the moving party is entitled to judgment as a matter of law. *Id.*

If satisfied that a proceeding involves an issue referable to arbitration under a written agreement, a court "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3. However, parties can only be required to submit to arbitration if they agreed to so submit. *AT & T Technologies v. Communications Workers of America*, 475 U.S. 643, 648 (1986). Unless the parties clearly provide otherwise, "the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *Id.* at 649. The court, if satisfied of the making of an agreement for arbitration, may "make an order directing the parties to proceed to arbitration." 9 U.S.C. § 4.

IV. DISCUSSION

Section 301 of the Labor Management Relations Act provides for suits by and against labor organizations. *See* 29 U.S.C. § 301(a). The plaintiff, under a § 301 claim, must sufficiently plead that there was a violation of a contract "between an employer and a labor organization representing employees affecting commerce as defined in this chapter." *Id.* Defendant Local 287 admits that it is a "labor organization" within the meaning of § 301. (Answer 2.) In its answer and 12(c) motion, however, Defendant denies the ratification of the July 2, 2005 contract between the parties. In addition, Defendant argues that Plaintiff's complaint is legally deficient on its face because the contract dispute must be decided in arbitration rather than in the courts.

The Court finds that Plaintiff's complaint sufficiently alleges a claim under § 301. Plaintiff

alleges an oral agreement and employee ratification of the collective bargaining agreement, specifying the date the agreement was made, July 2, 2005, and the person who informed Plaintiff of the ratification, Union representative George Netto. Plaintiff has included a copy of the alleged contract as an exhibit to its complaint. Plaintiff has also satisfactorily alleged a violation of the agreement, claiming that Defendant Local 287 prompted employees to go out on strike in violation of the agreement. In this 12(c) motion for judgment on the pleadings, the Court accepts as true the allegations of the Plaintiff Granite Rock, here the non-moving party. *See Hal Roach Studios*, 896 F.2d at 1450. Moreover, at this point in the litigation, there is a clearly a disputed issue of material fact as to whether there was a ratified contract at all. *See id.*

Defendant's argument that the dispute is subject to the grievance and arbitration provisions of the contract, rather than court adjudication, is misplaced at this time. The provisions of the contract would only be binding if there was a contract in the first place; yet, Defendant claims the contract was never ratified. Defendant, of course, is allowed to plead in the alternative under Federal Rule of Civil Procedure 8(e)(2). However, Defendant cannot avail itself of arbitration while at the same time insisting that the agreement was never ratified. Moreover, for the purposes of a 12(c) motion, the Court need not determine the merits of the dispute; here, it is enough that a material issue of fact remains over the existence of the contract. *See Hal Roach Studios*, 896 F.2d at 1550 (judgment on the pleadings is only proper when moving party clearly establishes that

no material issue of fact remains). Thus, Defendant's 12(c) motion for judgment on the pleading is denied.

The Court also denies Defendant's alternative motion for a stay of these proceedings pending arbitration. A stay of a proceeding pending arbitration will only be granted if the court is satisfied that the dispute involves an issue referable to arbitration according to a written agreement. 9 U.S.C. § 3. However, "the existence and scope of a contract to arbitrate are questions for the court to determine in the first instance." *California Trucking Assn v. Teamsters Local 70*, 679 F.2d 1275, 1280 (9th Cir. 1982). Unless the parties agree otherwise, the courts decide whether the parties have agreed to arbitrate specific issues. *Id.* Here, Defendant Local 287 denies the ratification of the July 2, 2005 collective bargaining agreement. Thus, the Court must first decide whether a contract exists before either party can be subject to or ordered to take their dispute to arbitration. The Court cannot determine from the pleadings before it, as a matter of law, whether the contract was ratified. Without a judicial determination of the existence and scope of the alleged collective bargaining agreement, the Court will not stay these proceedings pending arbitration at this time.

V. CONCLUSION

For the foregoing reasons, the Court DENIES Defendant's motion for judgment on the pleadings, or, in the alternative, for an order staying these proceedings pending arbitration.

Dated: July 18, 2005

/s/ James Ware
JAMES WARE
United States District Judge

[FILED
DEC 30 2008
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GRANITE ROCK COMPANY, Plaintiff - Appellant, v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, FREIGHT CONSTRUCTION, GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL 287 (AFL-CIO); INTERNATIONAL BROTHERHOOD OF TEAMSTERS Defendants - Appellees.	No. 07-15040 D.C. No. CV-04-02767-JW Order

GRANITE ROCK COMPANY, Plaintiff - Appellee, v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, FREIGHT CONSTRUCTION, GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL 287 (AFL-CIO, Defendant - Appellant, and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Defendant.	No. 07-16142 D.C. No. CV-04-02767-JW

GRANITE ROCK COMPANY, Plaintiff - Appellant, v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, FREIGHT	No. 07-16236 D.C. No. CV-04-02767-JW

CONSTRUCTION, GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL 287 (AFL-CIO); INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Defendants - Appellees.

Before: Ronald M. Gould and Carlos T. Bea, Circuit Judges, and James W. Sedwick,* District Judge.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35. Appellant's Petition for Rehearing En Banc is DENIED.

---

* The Honorable John W. Sedwick, Chief United States District Judge for the District of Alaska, sitting by designation.

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments. Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction. For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process. The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency. For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

[Dated, June 8, 2008].

GARRY G. MATHIASON, Bar No. 051119
ALAN S. LEVINS, Bar No. 057612
ADAM J. PETERS, Bar No. 230812
KIMBERLY L. OWENS, Bar No. 233185
LITTLER MENDELSON
A Professional Corporation
650 California Street, 20th Floor
San Francisco, CA 94108.2693
Telephone: 415.433.1940
Facsimile: 415.399.8490
E-mail: alevins@littler.com

Attorneys for Plaintiff
GRANITE ROCK COMPANY

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

GRANITE ROCK COMPANY, Plaintiff, v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, FREIGHT, CONSTRUCTION, GENERAL DRIVERS, WAREHOUSEMEN	Case No. C 04 2767 JW THIRD AMENDED COMPLAINT FOR DAMAGES (DEMAND FOR JURY TRIAL)

AND HELPERS, LOCAL 287; INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Defendants.

COMES NOW, the Plaintiff and complains against Defendants as follows:

JURISDICTION

1. This is a suit for damages pursuant to Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a). This Court has jurisdiction under Section 301 and under 28 U.S.C. § 1337.

VENUE

2. Venue is proper in the Northern District of California because a substantial part of the events or omissions giving rise to the claims occurred in this District.

INTRA-DISTRICT ASSIGNMENT

3. Assignment of this action to the San Jose Division of the United States District Court for the Northern District of California is proper under Civil Local Rule 3-2 because a substantial part of the events or omissions giving rise to the claims occurred in Santa Clara County. Civil L.R. 3-2(e).

PARTIES

4. Plaintiff Granite Rock Company ("Plaintiff" or "Granite Rock") is, and at all times material hereto

was, a California corporation engaged in the business of supplying ready mixed concrete for commercial use with its principal office at 350 Technology Drive, Watsonville, California 95077. In the past twelve months, Granite Rock has purchased more than $50,000 worth of goods and supplies directly from points located outside the State of California. Therefore, Granite Rock is an "employer" as that term is defined in the Labor Management Relations Act of 1947, as amended.

5. Defendant International Brotherhood of Teamsters, Freight, Construction, General Drivers, Warehousemen and Helpers, Local No. 287 (hereinafter "Defendant Local 287") is, and at all times material hereto was, a voluntary, unincorporated association, commonly known as and doing business as a labor organization within the meaning of 29 U.S.C. section 185. Defendant Local 287 maintains an office and place of business at 1452 North Fourth Street, San Jose, California 95112. At all times material hereto, Defendant Local 287 acted as a labor organization that represented certain Granite Rock Company employees at Granite Rock's San Jose Concrete facility, referred to as the "Berryessa Plant." Defendant Local 287 is the collective bargaining representative for employees engaged as drivers at the Berryessa Plant. At all times material hereto, Defendant Local 287 was a local union chartered by the International Brotherhood of Teamsters.

6. Defendant International Brotherhood of Teamsters (hereinafter "Defendant IBT") is, and at all times material hereto was, a voluntary, unincorporated association, commonly known as and

doing business as a labor organization within the meaning of 29 U.S.C. section 185. Defendant IBT charters local unions throughout California, including Defendant Local 287. Plaintiff alleges, based on limited discovery and with the expectation that evidentiary support will be obtained after a reasonable opportunity for further discovery, that Defendant Local 287 acted as an agent on behalf of Defendant IBT at all times material hereto for purposes of collective bargaining. Rome Aloise, the Administrative Assistant to the General President of Defendant IBT, played a key leadership role in the events that are the basis for this lawsuit. Rome Aloise is, and during all material times hereto was, an agent of Defendant IBT.

7. Rome Aloise, who played a key leadership role in the events giving rise to this lawsuit, was an agent of Defendant IBT at all material times, and acted on behalf of Defendant IBT. Mr. Aloise received orders directly from Defendant IBT and had a business card stating his position with Defendant IBT. Defendant IBT provided Aloise with a cellular telephone, which Plaintiff believes he used to communicate regarding Plaintiff. Plaintiff also believes that discovery will show that Defendant IBT reimbursed Mr. Aloise for his travel expenses related to his activities with respect to the Plaintiff in 2004.

8. Plaintiff Granite Rock Company is, and at all times material hereto was, an employer in an industry affecting commerce as defined in 29 U.S.C. section 142(1) and (3) and 29 U.S.C. section 152.5(5), and within the meaning of 29 U.S.C. section 185.

9. Under section 301(a) of the Labor Management Relations Act (29 U.S.C. section

185(a)), United States district courts have original jurisdiction over actions arising out of violations of contracts between labor organizations, regardless of citizenship and amount.

FACTUAL ALLEGATIONS

10. From the period of March 1, 1999, to April 30, 2004, Plaintiff and Defendant Local 287 were parties to a collective bargaining agreement that set forth the terms and conditions of employment for bargaining unit employees at Granite Rock's San Jose Concrete facility.

11. In March 2004, Plaintiff and Defendant Local 287 commenced preliminary negotiations on a new agreement. Thereafter, the parties continued negotiations over the course of the next three months.

12. On April 30, 2004, Plaintiff submitted a "Final Offer" to Defendant Local 287 for review. George Netto, Business Representative for Local 287, provided a copy of this proposal to Rome Aloise. A "Revised Final Offer" was submitted on or about May 21, 2004. Plaintiff's offers were rejected.

13. Rome Aloise assisted Local 287 in the negotiations with Plaintiff. For example, Aloise provided advice and input to Defendant Local 287 regarding Plaintiff's April 30, 2004 offer. Aloise instructed Local 287 that this proposal was not acceptable. Plaintiff believes that Aloise provided advice and input to Local 287 regarding other proposals that Plaintiff made to Local 287 during the negotiations. Aloise also provided information and assistance to Local 287 regarding the negotiations

over health plan benefits. When Plaintiff requested information from Local 287 regarding a health plan that was agreed to in a separate collective bargaining agreement with different employers, Local 287 told Plaintiff that the information would have to be provided by Aloise and that Aloise would explain the agreement to Plaintiff. Plaintiff did not receive the requested information until almost two months after it was requested. Plaintiff believes that Aloise was the reason Local 287 did not provide this information to Plaintiff. Aloise also prepared a document comparing the Teamsters' agreements for Plaintiff's San Jose Concrete and Peninsula Concrete facilities, which he provided to Local 287. Local 287 presented the document drafted by Aloise to Plaintiff during the negotiations. Further, Aloise communicated to Plaintiff that he was willing to attend negotiations between Plaintiff and any Teamsters local before the Teamsters Joint Council would approve a strike sanction. Aloise also attended negotiation sessions with other unions involved in striking Plaintiff's facilities and proposed negotiation meetings and strategies to Plaintiff on behalf of other Teamsters-affiliated local unions, including a "committee of the whole" approach of bargaining collectively with all the relevant Teamsters-affiliated local unions in a single session. Aloise has claimed that most of such proposals were without the approval, or the need for approval, of the respective local unions or their business representatives.

14. Plaintiff believes, and on that basis asserts, that Aloise participated in negotiating the Agreement as a representative of Defendant IBT and to benefit Defendant IBT and other Teamsters

locals. Plaintiff believes that further evidentiary support will be obtained after a reasonable opportunity for further discovery.

15. In early June 2004, after the former collective bargaining agreement expired, the bargaining unit employees at Plaintiff's San Jose Concrete facility went out on strike.

16. Subsequent to the commencement of the strike, the parties met again to negotiate regarding the outstanding issues, with the key issue being the total economic package. On the evening of Thursday, July 1, 2004, Plaintiff and Defendant Local 287 met for negotiations. At approximately 4:00 a.m. on Friday, July 2, 2004, the parties reached agreement on terms for a new four-year collective bargaining agreement covering the term of May 1, 2004 through April 30, 2008 (the "Agreement").

17. At the conclusion of the session, George Netto, Business Representative for Defendant Teamsters Local 287, told Plaintiff's President and Chief Executive Officer, Bruce Woolpert, that he would present the Agreement to the bargaining unit employees for ratification at 9:00 a.m. that same day (Friday, July 2, 2004), and promised that he (Netto) would recommend approval. Netto also stated that the pickets would be removed.

18. The Agreement maintained the same contract language as the previous agreement except as noted in Plaintiff's July 2, 2004 "Final Offer." The grievance and arbitration provisions set forth in Section 20 of the prior collective bargaining agreement, as well as the no-strike language, were

to remain the same in the new Agreement (with one exception not relevant to this matter). At the conclusion of the session on Friday, July 2, 2004, the parties discussed preparing a Back to Work Agreement at a later date.

19. The very first cellular telephone call that Netto made after the Agreement was reached was to Rome Aloise, whom he called at approximately 7:01 a.m. on July 2, 2006. The call lasted approximately five minutes.

20. On or about 9:00 a.m. on Friday, July 2, 2004, a ratification meeting was held with the Granite Rock Company bargaining unit employees at Local 287's headquarters. At the meeting, the Agreement was presented orally to the Local 287 members and a vote was held. Plaintiff is informed and believes that the employees voted affirmatively to ratify the Agreement and/or ratified the Agreement in effect by approving the only item of possible contention. That same day, several employees contacted Plaintiff regarding returning to work. Later that day, Netto contacted Plaintiff and stated that the Agreement was ratified.

21. Plaintiff is informed and believes that Defendant IBT was aware of the existence of the Agreement as of July 2, 2006. Netto telephoned Rome Aloise again that afternoon after the Agreement was ratified.

22. Plaintiff believes that discovery will show that, at some point before Tuesday, July 6, 2004, it became apparent to Defendant Local 287 and to Aloise that they had to apply pressure to Plaintiff or the Back to Work Agreement would not include a

blanket hold-harmless agreement for Teamsters Local 287, Defendant IBT, and Teamsters Locals 853, 890, and/or 912 ("Teamsters Locals") for damage caused by the unlawful strike, and by the Teamsters Locals honoring the unlawful Local 287 picket line and violating the Teamsters Locals' collective bargaining agreements.

23. Therefore, on Monday, July 5, 2004, in repudiation of the Agreement and in violation of its provisions, individuals acting on behalf of Defendant Local 287 and/or (discovery will show) Rome Aloise, acting on behalf of Defendant IBT, called union members at their homes and instructed, authorized, instigated, and encouraged them to not return to work.

24. The next day (Tuesday, July 6, 2004), Defendant Local 287 informed Plaintiff that its members would not return to work until Plaintiff executed a Back to Work Agreement that included a hold-harmless agreement guaranteeing amnesty for Local 287 and its members and for the Teamsters Locals and employees at Plaintiff's other facilities in three counties covered under separate collective bargaining agreements. Thus, Defendants Local 287 took a position that would require Plaintiff to drop its previously issued grievances against the respective unions for violating the no-strike provisions of their individual labor contracts as a condition to honoring and complying with the Agreement reached on July 2, 2004.

25. Additionally, the Back to Work Agreement proposals submitted to Plaintiff contained broad language that would have prevented Plaintiff from pursuing any unfair labor practice charges,

grievances, lawsuits and/or other administrative procedures against "any labor organization" that arose out of the then-existing labor dispute. This broad language, which was never executed, would have protected Defendant IBT from any liability resulting from its involvement and the involvement of its agent, Rome Aloise, in inducing the unlawful strike. Plaintiff believes that Defendant IBT instructed, ratified and/or encouraged Local 287 to take this position, which would benefit not only other Teamsters affiliated local unions besides Defendant Local 287, but Defendant IBT itself. Plaintiff believes that further evidentiary support will be obtained after a reasonable opportunity for further discovery.

26. Rome Aloise spoke with George Netto numerous times regarding the Back to Work Agreement. Aloise also telephoned Plaintiff regarding ideas for the Back to Work Agreement, and told Plaintiff "the Teamsters" would settle the dispute involving Defendant Local 287 and push settlement of a dispute involving another of Plaintiff's facility regarding a separate collective bargaining agreement if Plaintiff agreed to the proposed Back to Work Agreement. Plaintiff believes that Rome Aloise, acting on behalf of Defendant IBT, instructed Defendant Local 287 that it was not to honor the Agreement unless and until Plaintiff agreed to a Back to Work Agreement with a broad hold-harmless provision that would protect Defendant IBT in addition to the Teamsters Locals from liability related to the strike.

27. On August 22, 2004, Defendant Local 287 held another ratification vote, during which the

bargaining unit employees again approved the Agreement, which contained the same terms as it did when it was ratified on July 2, 2004. Defendant Local 287 held this ratification vote because Rome Aloise, acting on behalf of Defendant IBT, advised Local 287 that it could finally settle the dispute.

28. Defendant Local 287 engaged in an unlawful strike that breached the terms of its Agreement until September 13, 2004. Additionally, Plaintiff's employees covered under separate collective bargaining agreements with different local unions, affiliated with Defendant IBT or other international unions, refused to cross the Teamsters' unlawful picket line at Plaintiff's other facilities.

29. Defendant Local 287 refused to abide by the terms and conditions of the Agreement. The Agreement includes a valid no-strike clause that precluded the work stoppage. Plaintiff duly performed all conditions of the Agreement on its part to be performed, such as calling people to work shifts consistent with the Agreement. By its actions and conduct alleged herein, Defendant Local 287 breached the Agreement, and, in particular, the no-strike obligation.

30. Rome Aloise played a leadership role in the strike, encouraging employees to continue the work stoppage, giving speeches to employees and union representatives, writing letters to representatives of various local unions, including George Netto, Business Representative for Defendant Teamsters Local 287, writing letters to employees directly, rallying the various Teamsters locals to cooperate in striking Plaintiff's facilities and support the strike at the San Jose Concrete facility financially and

otherwise, and meeting with local union representatives, including Netto, to discuss strategy regarding the strike. Aloise also made representations to Plaintiff's Director of Human Resources, Shirley Ow, that he had the authority of Defendant IBT to settle the unlawful strike.

31. Plaintiff believes that Rome Aloise and Defendant IBT's actions with respect to the unlawful strike were malicious and/or intentional efforts to interfere with the Agreement and were designed to cause, induce, instigate and/or encourage Local 287's breach of the Agreement's no-strike clause.

32. Throughout the unlawful strike, Plaintiff's employees who were members of Defendant Local 287 received strike benefits from Defendant IBT as long as they did not return to work. In granting the out-of-work benefits, Defendant IBT ratified the unlawful strike as being of benefit both to it and to Defendant Local 287. By providing these benefits, Defendant IBT also allowed the strike to continue for a protracted period of time and encouraged employees to remain on strike to receive the benefits. Defendant IBT only provided the benefits to employees who remained on strike for a certain number of days.

33. During all times material hereto, Defendant IBT financially supported Defendant Local 287. In 2001, Defendant IBT provided a loan of $1.2 million dollars to Defendant Local 287 that was in effect throughout 2004. Defendant IBT required Defendant Local 287 to comply with numerous conditions to obtain and keep the loan. By its loan, Defendant IBT financially supported Defendant Local 287 and, in doing so, exerted actual control

over Defendant Local 287. Defendant IBT also required Defendant Local 287 to submit monthly reports regarding its financial affairs and to undergo financial audits.

34. As a result of the actions of Defendant IBT, its officers, employees, and agents (including both Defendant Local 287 and Rome Aloise), Plaintiff has been deprived of the benefits of its Agreement. Without the Agreement, Plaintiff was deprived, inter alia, of the benefits of the no-strike protections contained in the contract as well as the labor peace and stability generally attendant to a collective bargaining agreement.

35. On May 31, 2006, a unanimous panel of the National Labor Relations Board in Washington, D.C., held that the Agreement, as a matter of federal law, must given retroactive effect to July 2, 2004. (See, 347 NLRB No. 2, pp. 1-2.)

36. By reason of the aforesaid breach of the Agreement, Plaintiff was unfairly and improperly prevented from conducting its normal business activities of supplying ready mix concrete for its commercial customers. As a result of Defendants' actions, Plaintiff suffered extensive monetary damage, including, but not limited to, loss of business and market share, harm to its business reputation, wasted overhead expenses, additional expenses required to maintain business operations during the unlawful strike, and expenses associated with recruiting and training employees to replace employees who left Plaintiff's employment as a direct result of the unlawful strike.

FIRST CLAIM FOR RELIEF

Breach Of Contract Against Defendant Local 287

(Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a))

37. Plaintiff alleges the facts contained in Paragraphs 1 through 36 above, as though set forth herein in their entirety.

38. The Agreement to which both Plaintiff and Defendant Local 287 were parties, contained an express no-strike provision and a mandatory grievance procedure and existed as of July 2, 2004.

39. Defendant Local 287 breached the Agreement by continuing to engage in a strike that violated the no-strike provision of the Agreement until September 13, 2004. Alternatively, Defendant Local 287 also committed a breach by violating its promise to present the Agreement to the bargaining unit employees on July 2, 2004, and to recommend approval of the Agreement.

40. Defendant Local 287's breach caused Plaintiff to suffer extensive monetary damages, including, but not limited to, lost profits and market share, damage to its business reputation, expenses required to maintain business operations during the unlawful strike, wasted overhead expenses and expenses incurred to recruit and train new employees.

41. Regardless of the theories alleged below, Defendant Local 287, as signatory to the Agreement, is liable under Section 301 for Plaintiff's damages resulting from the breach of the Agreement.

SECOND CLAIM FOR RELIEF

Interference/Inducement of Breach of Contract Against Defendant IBT

(Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a))

42. Plaintiff repeats the allegations contained in Paragraphs 1 through 41 above, as though set forth herein in their entirety.

43. Plaintiff alleges that Defendant IBT was aware of the existence of the Agreement as of July 2, 2004, the date on which the Agreement became effective.

44. Plaintiff alleges that, by the actions alleged above involving Defendant IBT and/or its agent, Rome Aloise, Defendant IBT induced Defendant Local 287 to violate its promises to, and/or to breach its Agreement with Plaintiff, including, but not limited to, the no-strike clause in the Agreement.

45. Plaintiff believes that Defendant IBT induced Local 287 to breach the Agreement and interfered with Plaintiff's Agreement in order to put pressure on Plaintiff to agree to a Back to Work Agreement that included hold-harmless provisions that would protect Defendant IBT, Local 287 and the Teamsters Locals, all of which are affiliated with the IBT, from liability for their actions related to the unlawful strike.

46. Plaintiff alleges that Rome Aloise and Defendant IBT's actions with respect to the unlawful strike were taken maliciously with intent to

interfere with the Agreement and Plaintiff's benefit of the no-strike provision.

47. Plaintiff asserts that a causal relationship exists between Rome Aloise and Defendant IBT's participation in and support of the unlawful strike and the breach of the Agreement.

48. As a direct result of the breach of the Agreement, Plaintiff has suffered extensive damages, including, but not limited to, lost profits and market share, expenses required to maintain business operations during the unlawful strike, and expenses incurred to recruit and train new employees.

49. Congress enacted Section 301 of the Labor Management Relations Act (29 U.S.C. § 185) to ensure the enforceability of collective bargaining agreements under the federal common law. Defendant IBT's actions violated Section 301 and the federal common law because Defendant IBT's actions created a breach of the Agreement, a federally protected collective bargaining agreement, in existence as of July 2, 2004.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays as follows:

1. For damages according to proof;

2. That Plaintiff be allowed its costs of suit and attorneys' fees herein incurred;

3. For such other and further relief that the facts of this Complaint entitle Plaintiff; and,

4. For such other and further relief as the Court may deem proper and just.

Dated: June 8, 2006

/s

GARRY G. MATHIASON
ALAN S. LEVINS
LITTLER MENDELSON
A Professional Corporation
Attorneys for Plaintiff
GRANITE ROCK
COMPANY

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial as provided by Rule 38 of the Federal Rules of Civil Procedure.

Dated: June 8, 2006

/s

ALAN S. LEVINS
LITTLER MENDELSON
A Professional Corporation
Attorneys for Plaintiff
GRANITE ROCK
COMPANY

July 2, 2004

SAN JOSE CONCRETE AGREEMENT

Graniterock Last, Best and Final Offer

SECTION 3—HIRING AND EMPLOYMENT

Add the following sentence between b. and c.:

The Union recognizes that the Employer has not utilized this provision; however, in the event it is used, the following provisions would be applicable.

SECTION 4 — SENIORITY

d. *Seniority Loss.* All seniority shall be considered broken by:

6. An employee who applies for and receives pension payments unless required by federal or state law.

SECTION 5—SCHEDULE OF WORK TIME

b. *Starting Times.* Starting times shall be between 6:00 a.m., ~~6:15 a.m., 6:30 a.m., 6:45 a.m., 7:00 a.m., 7:30 a.m., 8:00 a.m., 8:30 a.m.,~~ and 9:00 a.m. on one-quarter (1/4) hour intervals. These starting times shall apply to Saturdays. Sundays and holidays. Other starting times may be permitted on a temporary basis if the Union consents in advance.

c. *Guaranteed Work Day* - In the event an employee is put to work, the employee shall be guaranteed four (4) hours work ~~or pay~~; if more than four (4) hours are worked, guaranteed six (6) hours

~~pay~~work, and if more than six (6) hours are worked, guaranteed eight (8) hours ~~pay~~work. However, in the event of industrial injury, the employee shall receive eight (8) hours pay. In connection with the guaranteed work day, it is understood that employees shall cooperate with the Employer In performing work other than driving in accordance with past practice. Employees who leave work voluntarily or who leave work because of illness shall be paid for hours worked.

f. *Saturday, Sunday and Holiday Work* - When work is performed on Saturday, employees shall receive a minimum of four (4) hours pay for any part of a day, to be paid for at the rate of time and one-half (1-1/2), except as otherwise provided in this Agreement.

When work is performed on Sundays or holidays, employees. shall receive a full day's pay, as described in c. above, at the overtime rate for any part of a day, except as otherwise provided in this Agreement. The senior employee shall be offered Saturday, Sunday and holiday work where qualified.

j. (New) *Voluntary Call-In Work* - When additional employees are needed after 10:00 a.m. in response to new orders or orders which over-run their initial order quantities, the Employer may offer the work in seniority order to those drivers who have indicated on a list maintained by the Employer their willingness to perform such call-in work. Employees may add or delete their names on a wee y basis from this list. Employees reporting to work shall be paid no less than four (4) hours. The intent is to utilize this section when there is new work of at least four (4) hours arising from new orders or orders which

overrun. It is not the intent of this provision for employees who reported under the starting times in this Agreement (Section 5b) to suffer a reduction of hours. In the event the customer needs change, the Employer may utilize the employee for yard work in order to meet the four (4) hour minimum.

SECTION 8—SCHEDULE OF WAGES

b. *All New Employees.* - Replace with the following:

The following minimum trainee rates shall apply to new employees with little previous experience and training:

1st 1,000 hours of work	-	80%
2nd 1,000 hours of work	-	90%

e. (New) *Casual Relief Employees.* Casual relief employees may be utilized for the purposes of fill-in for absent employees only. Such relief employees shall be required to comply with Section 3-Hiring and Employment. Casual employees may be utilized during the period June 1 through October 31 only. A casual employee will be required to pay a monthly service fee (dues) to perform work covered under this Agreement but will not be required to pay the Union Membership initiation fees until the employee has completed the probationary period in Section 4-Seniority, or the employee continues to perform work for the Employer beyond October 31 during the same calendar year. If seniority is achieved, Health & Welfare contributions will be made according to Section 11-Health and Welfare. Contributions to the

Supplemental Income 401(K) Plan and Teamsters Pension Trust Fund will be made on the first hour of work. Nothing in this section shall modify or reduce the work afforded to senior employees as described in Section 4. Seniority.

f. (New) These wage rates below are minimums and the. Employer may pay any employee more.

SECTION 9—HOLIDAYS

Effective May 1, 2004

The following holidays, when not worked, shall be paid for at eight (8) times the employee's straight time hourly rate: New Years Day, Presidents' Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Friday After Thanksgiving Day, Day Before Christmas, Christmas Day, and the Employee's Birthday*. ~~The Day Before Christmas shall be considered a holiday in lieu of Admission Day. Employees qualifying for Admision Day (September 9) each year in accordance with the qualifying provisions of Section 9, shall be paid for the Day Before Christmas as a paid holiday.~~

Employee's birthday shall be considered a holiday. However, the individual employee shall provide the Employer with not less than two (2) calendar weeks advance notice of the date upon which the employee's birthday falls, in which event the employee shall be allowed to observe the holiday on the birthday, or such other day during the same calendar week as may be determined by mutual agreement between the employer and the individual employee. Where the individual employee fails to provide said two (2) calendar weeks advance notice

of the date upon which the birthday falls, the date upon which the holiday shall be observed will be by mutual consent of the employee and Employer.

Effective January 1, 2005

The following holidays, when not worked, shall be paid for at eight (8) times the employee's straight time hourly rate: New Year's Day, ~~Presidents' Day,~~ Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Friday After Thanksgiving Day, Day Before Christmas, Christmas Day, and ~~the Employee's Birthday~~* two (2) Floating Holidays.

The date upon which the Floating Holidays shill be observed will be by mutual agreement of thc Employee and Employer.. Employees who have established seniority by January 1 of each year shall be eligible for the two (2) Floating Holidays.

SECTION 10—VACATIONS

Replace c., d., e., f., g and h. with the following vacation schedule (no change in the benefit):

Years of Service	Vacation Hours	Days
1	48	6
2	64	8
3-4	80	10
5-9	120	15
10-19	160	20
20 and after	200	25

SECTION XX—RETIREE HEALTH AND WELFARE

Upon written notification from the Union that the employees wish to allocate their increase to fund retiree health and welfare coverage, the following language will apply:

Effective _____ 1, 200__, payable in [following month], the Employer shall contribute to the Teamsters Benefit Trust Retirement Security Plan an amount of one hundred forty seven dollars and thirty-one cents ($147.31) per month for each employee who has been paid for eighty (80) hours or more during the calendar month. If there is an increase in the contribution rate, the Union may elect to allocate the necessary amount from the wage and fringe benefit increases effective January 1 or June 1. In the event there is an increase in the Retiree Health and Welfare premium sifter the January 1 or June 1 increase has been allocated, the Straight-time rate shall be reduced to cover the increase. One hundred seventy-three (173) hours per month shall be used in calculating a conversion from dollars per month to cents per hour for health and welfare purposes.

Modification to language in Section 8—Schedule of Wages, Additional Increases:

Any increase in the Health and Welfare contributions to the Teamsters Benefit Trust Fund for Plan I or Teamsters Benefit Trust Retirement Security Plan (if applicable) shall be provided for and allocated from the January 1 and/or June 1 increases. Any balance remaining after allocation to Health and Welfare and/or Retiree Health and

Welfare (if applicable), the Union may elect at its option upon at least sixty (60) days' written notice to the Employer, be allocated to either wages, pension and/or the supplemental income 401k plan. One hundred seventy-three (173) hours per month shall be used in calculating a conversion from dollars per month to cents per hour for Health and Welfare and/or Retiree Health and Welfare (if applicable) purposes. In the event an Increase in Health and Welfare and/or Retiree Health and Welfare (if applicable) is needed after the January 1 and/or June 1 increase, the straight-time wage rate shall be reduced to reflect the increase unless the Employer and Union meet to negotiate a lessor cost plan. No further allocation of the increase beyond the one hundred seventy-three hour divisor shall be applied to wages or to any other existing funded fringe.

SECTION 14—SICK LEAVE

Such sick leave with pay shall be applicable! only in cases of bona fide illness or accident of the employee, or to care for a sick child, parent, spouse or domestic partner. In cases of apparent abuse the Employer may require a doctor's certificate or other reasonable proof of illness. Sick leave shall be paid in the following manner:

SECTION 15—JURY DUTY

When an employee who his established seniority is unable to report for work on his/her assigned shift by reason of jury duty, the employee will, upon furnishing written proof of such service, be paid the difference between the jury pay, if any, and the amount the employee would have been paid if the employee had worked an eight hour day, with a

maximum of thirty-five (35) days per year at the appropriate rate of pay if scheduled to work.

a. ~~Day shift e~~Employees called jury duty or examination and excused by the court prior to 12:00 noon shall return to work for the balance of their day shift and shall be paid the difference between the jury pay or examination pay, If any, and their straight-time pay lost.

~~b. Night or swing shift employees called for jury duty or examination and excused by the court prior to noon shall report for their regular night shift or swing shift and shall not be eligible for any jury pay.~~

~~c. Night shift or swing shift employees (except as provided in b. above) shall not be required to work on jury duty in the daytime and work night shift or swing shift on the same calendar day, but shall receive the difference between their jury pay and their regular shift pay lost.~~

~~e. Pay for jury duty shall not apply in any case where an employee voluntarily seeks jury duty.~~

SECTION 29—GRIEVANCE PROCEDURE

c. If the dispute is referred to arbitration by either party, the parties agree that the Arbitrator shall be either ~~Charles Askin or~~ Franklin Sliver or another. Arbitrator mutually agreed upon by both parties.

SECTION 22—STRIKES AND LOCKOUTS

In addition, it will not be considered a violation of this agreement and an employee will not be permanently replaced for honoring a lawful primary

picket line sanctioned by Joint Council of Teamsters No. 7 or the Building Trades Council and/or the Central Labor Council, provided, however, picket lines sanctioned or authorized above must also be approved by Teamsters Local 287, at any non-Employer property, except when the following situations arise at such non-Employer property: (1) a reserved gate system has been established; or (2) the Union has failed to provide the Employer with written notice of e lawful primary labor dispute ~~prior to the close of business on the day~~ twenty-four (24) hours before any employee refuses to enter property where the picket line has. been established; , (3) the picket line has been established by any union with a primary labor dispute with any Employer covered by this agreement.

SECTION 24—GENERAL PROVISIONS

p. *Attendance at Company Meetings.* No employee shall be required to. attend a company meeting on employee's own time. An employee shall receive pay for attending mandatory safety meetings. for the duration of the meeting with no less than two (2) hours at the straight-time rate of pay. The starting time of safety meetings may begin at 5:00 a.m. In addition, the Employer may provide one day (maximum of eight hours) of customer-related training during the calendar year with employees paid at their straight-time rate of pay for attendance. If held on Saturday, the employee shall be paid the straight-time rate of pay until completion of forty (40) hours in the workweek.

SECTION 27—TERM OF AGREEMENT

Four-year agreement, May 1, 2004 through April 30, 2008

ECONOMICS

Month	Economic Package	Rate Adjustment	Total
6/1/04	$ .31	$ 1.50	$ 1.81
6/1/05	$ 1.00		$ 1.00
1/1/06		$ .50	$ .50
6/1/06	$ 1.00		$ 1.00
1/1/07		$ .50	$ .50
6/1/07	$ 1.00*		$ 1.00
1/1/08		$ .50	$ .50

Total Economic Package = $3.31

Total Rate Adjustment = $3.00

*$.10 may be allocated to supplemental dues

The Union may allocate the economic and rate adjustment increases to wages, pension, supplemental income 401(k), health and welfare and/or retiree health and welfare

This Supposal is subject to *formal acceptance by the Union and Employees* no later than Friday, July 2, 2004 by 9:00 a.m.; otherwise this Supposal is withdrawn.

Letter of Understanding to provide for the following:

SECTION 8—SCHEDULE. OF WAGES

d. *Saturday Work*

November 1 through March 31

If employees are needed to perform work on Saturday, Saturday work shall be offered In the following manner:

Driver 1: The first employee in seniority who has worked 32 or less straight time hours*

Driver 2: The first employee with the highest seniority who has worked 40 straight time hours

Driver 3: The second employee in seniority who has worked 32 or less straight time hours*

Driver 4: The second employee with the highest seniority who has worked 40 straight time hours

Driver 5: The third employee in seniority who has worked 32 or less straight time hours

Driver 6: The third employee with the highest seniority who has worked 40 straight time hours

If additional drivers are needed, the alternating order described above would continue.

*Saturday work shall be offered to employees who have worked thirty-two (32) or less straight time hours during the normal workweek (Monday through Friday) as described above. Such Saturday

work shall be performed at the straight time rate of pay until the employee has. completed a forty (40) hour workweek. Hours thereafter shall be considered overtime.

AGREEMENT

This Agreement, entered into by and between Granite Rock Company at its San Jose Concrete facility, 11711 Berryessa Road, San Jose, California, hereinafter called "Employer" and Teamsters Local 287 affiliated with the international Brotherhood of Teamsters, Chauffeurs, and Warehousemen of America, hereinafter called the "Union".

The Union shall have exclusive jurisdiction over all work covered by this Agreement.

All regular employees and equipment of the Employer covered by this Agreement shall perform work before any other employees or equipment are utilized.

SECTION 1—UNION RECOGNITION

a. The Union is hereby recognized as the representative for bargaining purposes of all persons performing work falling within the classifications hereinafter set forth.

b. The Union hereby recognizes the Employer as the collective bargaining representative for its members covered by this Agreement.

c. The Employer agrees not to enter into any agreement or contract with its employees individually or collectively which in any way conflicts with the terms and conditions of this Agreement If the Employer continues to violate this section of the Agreement, after receipt of written

notice from the Union, the Union may take any legal or economic action against the Employer and this section shall not be subject to grievance procedures of this Agreement

SECTION 2—EQUIPMENT

a. *Additional Ready Mixed Trucks.* For the purpose of preserving work and job opportunity for employees it is agreed that no ready mix trucks are to be operated other than those that are company owned or leased from the Employer covered by this or any other Teamster agreement whenever practical.

Transfer of Equipment. The Employer has the right to transfer equipment between any company owned operations. However, such transfer of equipment shall not occur to avoid the terms of this Agreement. In the event the Employer permanently transfers equipment for more than 30 days from one local jurisdiction to another within Joint Council of Teamsters #7, the employees affected will be offered the opportunity to move with the equipment by seniority. If the employee chooses to go with the equipment, he/she shall go to the bottom of the seniority list for daily work assignment but will retain the company seniority for all other purposes; provided, however, all employees of the company who have seniority (and are qualified) but are on layoff will be given preference to work on this equipment before the transferred employee. The Union shall be . notified of any transfer of equipment

b. *Utilization of Equipment.* The Employer may dispatch an employee for a maximum of one load to

another plant across Union jurisdictional lines after 2:00 p.m.

SECTION 3—HIRING AND EMPLOYMENT

a. Only members in good standing in the Union shall be retained in employment. For the purposes of this section, "members in good standing" shall be defined to mean employee members in the Union who tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership. Non-members of the Union hired by the Employer must complete membership affiliation on the thirty-first (31st) day of employment, and the Union agrees to accept said non-members Into membership on the same terms and conditions generally applicable to other members. Upon written mince from the Union of failure on the part of any individual to complete membership in the Union as above required, or of failure to continue payment of dues to the Union, the Employer shall within seven (7) days of such notice discharge said employee.

b. *Exclusive Hiring.* Except when the Employer fills a driver position with an existing Graniterock employee, the Employer shall notify the union office, either in writing or by telephone, stating the location, starting time, and approximate duration of the job, the type of work to be performed; and the number of workers required.

The Union recognizes that the Employer has not utilized this provision; however, in the event it is used, the following provisions would be applicable.

c. *Dispatching Standards.* Upon receipt of such notice, the Union shall endeavor to furnish the workers requested. Selection of workers for referral to jobs shaft be on a non-discriminatory basis and shall not be based on or in any way affected by Union membership, by-laws, rules, regulations, constitutional provisions, or any other aspect of Union membership, policies or requirements. Such selection will be made on the following basis:

1. The Union shall maintain a list of all workers seeking jobs who have been employed on the type of work and in the Union covered by this Agreement for a period of at least one (1) year, which list shall hereinafter be called "List A". The Union shall maintain a separate list of all workers seeking jobs who do not meet that requirement, which list shall hereinafter be called "List B".

2. Workers' names shall be entered on said lists in the order in which they notify the Union of their availability for jobs.

3. After each worker's name shall be entered a designation corresponding to the type or types of work which the worker is qualified to perform. The Employer shall have the right to reject any worker referred by the employment office of the Union.

4. In dispatching workers, preference shall be given to workers on List A. Within each list, preference shall be given to those whose designations correspond to the type of work involved, in the order in which their names appear on the list.

If there are not sufficient workers on List A whose designations correspond to the type of work involved,

preference shall be given to other workers on said list in the order in which their names appear, and the same procedure shall be followed with List B, should the names on List A be exhausted. The dispatcher need not dispatch a worker next in order if such worker is, because of obvious physical incapacity, unable to perform the work involved.

5. The Employer may call for a particular worker by name who has qualified for the "A" List regardless of the worker's position on that list. Only after the "A" List Is exhausted may the Employer call for a particular worker by name on the "B" List who has previously worked for the Employer or who has been trained by the Employer.

"A" List Registrants. An individual who has been employed pursuant to the terms of this Agreement or the Bay Area Building Material Teamsters Agreement for twelve hundred (1200) hours or more during the twelve (12) month period preceding his/her registration date, shall be entitled to register on the "A" List.

"B" List Registrants. An individual who has been available for employment or employed pursuant to the terms of this Agreement or the Bay Area Building Material Teamsters Agreement for a period of one (1) year or more preceding his/her registration, or who has been trained by the Employer, shall be' entitled to register on the "B" List provided he/she is not otherwise entitled to register on the "A" List. The Employer shall notify the Union on a current basis the names and social security numbers of those individuals who have been trained and those who are being trained.

d. *Referral.* For each worker dispatched, the Union shall send the Employer, with the worker or by mail or fax, written referral slips, one (1) copy to be given to the Employer. The Employer may reject any Worker for employment dispatched by an employment office, provided; however, that any such worker reporting for work at the agreed time and the designated place and rejected by the Employer shall be paid in the amount provided in Section 7 of this Agreement unless such worker is rejected because the person reported in a condition unfit for work or because the worker in fact does not have the experience or qualifications specified in the Employer's request. The. Employer may reject a worker who has been discharged for a major cause regardless of the date of discharge. Rejection of a worker must be by written notice to the Union.

"Do not send" letters shall remain in effect for a maximum period of one (1) year. Thereafter, workers shall be eligible to be dispatched to the Employer that originated the "do not send" letter. Such time restrictions shall not be applicable if the "do not send" letter was originated because of a major dischargeable offense.

e. *Notification.* If the Employer calls the Union employment office for workers and if the employment office Is closed or is unable to furnish qualified workers for immediate dispatch, then the Employer is free to obtain workers from any source or sources. The Employer shall in such event notify the Union within twenty-four (24) hours of the name, address and social security number of workers so hired. However, if prior to the close of a work day the Employer knows that additional worker(s) will be

required for the following day, the Employer shall notify the employment office.

f. *Labor Management Relations Act.* In applying the above provisions, it is agreed that the parties will adhere to Section 8 (a) (3) and 8 (b) (2) of the Labor Management Relations Act, as amended, so long as such sections remain in effect.

Exclusions from Application. This Agreement shall not apply to superintendents, assistant superintendents, general foremen, foremen or any supervisors in charge of any class of labor, timekeepers, messenger persons, confidential employees and office help. No foreman shall be allowed to operate any mechanical equipment

g. *Equal Employment Opportunity.* No employee or applicant for employment covered by this Agreement shall be discriminated against because of membership in the Union or activities on behalf of the Union, and the Union agrees that employees covered hereby shall be admitted to membership without discrimination. In accordance with applicable local, state and federal laws and regulations, neither the Employer, the Union or the employees shall discriminate or engage in behavior and/or conduct of a harassing nature (involving race, creed, color, age, sex, religion, national origin, ancestry, sexual orientation, handicap, disability or otherwise) against anyone doing business with the Employer or any employee or applicant for employment covered by this Agreement. Additionally, any discrimination, harassment, coercion or intimidation by the Employer, the Union or the employees against any employee or applicant for employment shall be a violation of this

Agreement. To facilitate prompt resolution of complaints filed under the provisions of this Section, the parties recognize the Employer has available to employees internal Investigative complaint procedures that are established to resolve such disputes. Employees are encouraged to utilize the Employer's complaint procedures.

SECTION 4—SENIORITY

a. *Seniority Principle.* The application of the seniority principle shall be on a plant basis for daily work assignments both in terms of reduction and recall.

b. *Probationary Employees.* Employees shall have no seniority rights and shall be considered probationary employees until they have first been employed for a total of forty-five (45) work days in any six (6) consecutive month period for the Employer under this Agreement. During the probationary period, employees may. be terminated by the Employer for any reason without recourse, notwithstanding any provision in this Agreement to the contrary. On the date that employees complete their probationary period, the seniority date for all purposes shall be retroactive to forty-five (45) work days prior to such qualification date.

c. *Seniority Loss.* All seniority shall be considered broken by:

1. Discharge for just cause;
2. Resignation;
3. Twelve (12) consecutive months of unemployment;

4. Failure to report to work after receiving a recall letter. Notice of recall shall be sent by registered mail to the employee's last known address, which address shall be deemed conclusive on all parties. An employee will have five (5) work days in which to report for work from the date of receipt or attempted delivery.

5. If a member takes withdrawal or transfer card, or is suspended from the Union and as provided for in Section 3 a. of this Agreement, fails to regain good standing status in the Union;

6. An employee who applies for and receives pension payments unless required by federal or state law.

Posting. The Employer shall send to the Union, a current copy of the seniority list once each six (6) months, or whenever there is a change in said seniority list, whichever occurs sooner. A copy of the list shall be posted on the Employer's bulletin board. The seniority date of an employee shown on such list shall be deemed conclusive on all parties unless the employee utilizes the grievance procedure under this Agreement within thirty (30) days after the first posting of such employee's seniority date to protest such seniority date.

d. *Single Company Seniority.* No employee shall maintain seniority at more than one company.

e. *Seniority Protection.* An employee who has been "continuously employed" as defined in Section 14—Sick Leave of this Agreement, and is absent from work because of bona fide industrial or non-industrial accident or illness shall continue to accrue seniority, including eligibility for vacation, for a period of up to one (1) year from the day of the last

employment prior to being absent for such bona fide illness or accident. If any such illness or injury shall continue beyond one (1) year, such additional time shall not accrue to the employee's seniority, and if the employee is able to return to work, the anniversary date for seniority and vacation purposes shall be moved forward by the amount of time the total absence shall have exceeded one (1) year.

f. *Daily Work Assignment.* All available daily work shall first be assigned on the basis of straight seniority by plant among all employees. For the purposes of this section, straight seniority is defined to mean that the senior employee shall be dispatched each work day that work is available. The senior employee shall be offered first starts where practical. The Employer agrees that the words "where practical" in this section shall not be used in dispatching to circumvent the senior employee's right to first starts and overtime. The employees retained under these conditions must be qualified and able to perform the work.

SECTION 5—SCHEDULE OF WORK TIME

a. *Work Day—Work Week.* Except as otherwise provided in this section, the regular work week shall consist of five (5) working days Monday through Friday. All work in excess of the regular week's work and in excess of eight (8) hours in any one day shall be paid for at the rate of time and one-half. Work performed before the regular starting time, or after the regular quitting time shall be considered overtime.

b. *Starting Times.* Starting times shall be between 6:00 a.m. and 9:00 a.m. on one-quarter (1/4)

hour intervals. These starting times shall apply to Saturdays, Sundays and holidays. Other starting times may be permitted on a temporary basis if the Union consents in advance.

c. *Guaranteed Work Day.* In the event an employee (regular or extra) is put to work, Monday through Friday, the employee shall be guaranteed four (4) hours work; if more than four (4) hours are worked, guaranteed six (6) hours work, and if more than six (6) hours are worked, guaranteed eight (8) hours work. However, in the event of industrial injury, the employee shall receive eight (8) hours pay. In connection with the guaranteed work day, it is understood that employees shall cooperate with the Employer In performing work other than driving in accordance with past practice. Employees who leave work voluntarily or who leave work because of illness shall be paid for hours worked.

d. *Saturday Work.*

April 1 through October 31

Saturday work shall be offered first in seniority order to those employees who have not worked five (5) days during the normal work week (Monday through Friday). Such Saturday work shall be performed at the straight time rate of pay for the first eight (8) hours. The starting time as provided in Section 5 shall be waived for this work; however, no starting times shall be permitted after 8:00 a.m., starting times shall be on the hour and one-half (1/2) hour increments.

Should there be a need for additional workers after making the offer as described above, and there

remain employees that have not worked five (5) days as described, then the Employer shall assign such work by inverse seniority order until such type remaining workers have been exhausted. Should there be further need for workers the provisions of Section 5e. shall apply.

If those employees having worked five (5) days during the regular work week (Monday through Friday) shall not be subject to this provision and the overtime rates provided herein shall be applicable for Saturday work.

It is agreed that regular customer work normally performed during the regular work week (Monday through Friday) shall not be subject to this provision and the overtime rates provided herein shall be applicable for Saturday work.

In order to preserve work for bargaining unit employees, the Union has the authority to allow its members to perform commercial work on Saturday in accordance with this sub-section. The batching and delivery of concrete with respect to the above shall only occur within the geographical jurisdiction of the Union giving the authority.

The provisions of this sub-section may be modified and/or waived with the express permission of the Union involved. It is not the intent of this provision to defeat or render meaningless the overtime provision of this Agreement but rather to use such modification or waiver for the express purpose of securing that market now being served by firms not signatory to this agreement affecting the jobs of workers employed hereunder.

It shall not be considered a violation of this provision should in the course of daily business, a worker employed under the terms and conditions of this provision be dispatched for no more than one (1) load (clean-up/end of day) to those jobs described above. Such worker shall be paid at the overtime rate for that load. In the event a worker is dispatched more than once to such job(s),, then the worker shall be paid overtime for all hours worked.

November 1 through March 31

If employees are needed to perform work on Saturday, Saturday work shall be offered in the following manner:

Driver 1:	The first employee in seniority who has worked 32 or less straight time hours*
Driver 2:	The first employee with the highest seniority who has worked 40 straight time hours
Driver 3:	The second employee in seniority who has worked 32 or less straight time hours*
Driver 4:	The second employee with the highest seniority who has worked 40 straight time hours
Driver 5:	The third employee in seniority who has worked 32 or less straight time hours*
Driver 6:	The third employee with the highest seniority who has worked 40 straight time hours

e. *Overtime Rate*. Overtime rate shall be time and one-half (1-1/2). All work performed on Saturday shall be paid at the overtime rate except as

otherwise provided in this. Agreement. Double the straight time hourly rate shall be paid for all work performed on Sundays and holidays. There shall be no pyramiding of overtime (overtime payments shall not be duplicated for the same hours worked).

f. *Saturday, Sunday and Holiday Work.* When work is performed on Saturday, employees shall receive a minimum of four (4) hours pay for any part of a day, to be paid for at the rate of time and one-half (1-1/2), except as otherwise provided in this Agreement.

When work is performed on Sundays or holidays, employees shall receive a full day's pay, as described. in c. above, at the overtime rate for any part of a day, except as otherwise provided in this Agreement. The senior employee shall be offered Saturday, Sunday and holiday work where qualified.

g. *Shift Work.* Where three (3) shifts are worked in continuous service, time for the first shift to begin work shall be between 6:30 a.m. and 7:30 a.m., for the second shift between 2:30 p.m. and 3:30 p.m., and for the third shift between 10:30 p.m. and 11:30 p.m.; and where two shifts are worked, time for the first shift to begin work shall be between 6:00 a.m. and 8:00 a.m., and for the second shift between 2:00 p.m. and 4:00 p.m.; provided, however, that starting times may by mutual consent be other than stated above in order to coordinate the work of the dealer with the Work of the contractor. When two (2) or three (3) shifts are employed, eight (8) hours shall constitute a day's work for the first shift for which eight (8) hours straight time shall be paid and seven and one-half (7 & 1/2) hours shall constitute a day's work for the second shift for which eight (8) hours

straight time shall be paid; and seven (7) hours shall constitute a days work for the third shift for which eight (8) hours straight time shall be paid.

h. *Special Single Shift.* When the Employer produces evidence in writing to the Union of a bona fide job requirement in which work can only be done outside the normal shift hours, and notifies the Union in writing by fax prior to the start of such special shift (except in the case of emergency), the Employer may initiate such special shift of eight (8) consecutive hours (not in conjunction with any other shift), exclusive of meal period, Monday through Friday. This special single shift may start at any time between the hours of 8:00 p.m. and 11:30 p.m. and may not continue beyond 7:30 a.m. the following morning. There shall be a five driller ($6.00) per hour premium at the applicable rate for each hour worked. If an employee works more than eight (8) hours under the provisions of this subsection, the special shift premium shall be included in the calculation of overtime. The scheduling of work on this special single shift shall not result in the loss of wait opportunity for those scheduled, i.e. five (5) straight time days Monday through Friday.

In order to utilize equipment for the next shift, eight (8) hours work shall consist of a shift. Employees shall receive an eight (8) hour rest break between shifts.

I. *Call back.* In the event of an emergency an employee may be recalled to work by the Employer after he/she has completed his/her regular shift and left the Employer's premises for home and he/she shall be guaranteed three (3) hours' pay at the overtime rate for three (3) hours or less work. This

sub-section shall not be used to circumvent the shift work or special single shift provided in g. and h. above.

j. *Voluntary Call-In Work.* When additional employees are needed after 10:00 a.m. in response to new orders or orders which over-run their initial order quantities, the Employer May offer the work in seniority order to those drivers who have indicated on a list maintained by the Employer their willingness to perform such call-in work. Employees may add or delete their names on a weekly basis from this list. Employees reporting to work shall be paid no less than four (4) hours. The intent is to utilize this section when there is new work of at least four (4) hours arising from new orders or orders which over-run. it is not the intent of this provision for employees who reported under the starting times in this Agreement (Section 5 b) to suffer a reduction of hours. In the event the customer needs change, the Employer may utilize the employee for yard work in order to meet the four (4) hour minimum.

SECTION 6—LUNCH PERIODS

a. One period of one-half (1/2) hour shall be taken for lunch during the regular work day, unless otherwise specifically instructed by the Employer. Said lunch period shall commence between the fourth (4th) and fifth and one half (5 & 1/2) hour of employment If workers are instructed to work through their lunch period, they shall be paid time and one-half (1-1/2) for such overtime, and in addition shall be allowed fifteen (15) minutes to eat immediately after the load that prevents the worker from taking lunch during the above lunch starting

times. Such payment shall be separate and distinct from any overtime payment.

Those employees working on Saturday, Sunday or holidays on overtime who are instructed to work through their lunch period shall be allowed fifteen (15) minutes to eat or be paid for same.

b. When additional consecutive shifts are worked, one-half (1/2) hour lunch shall be taken during each such shift at the end of the half (1/2) shift.

c. On a normal single shift operation, employees working overtime two and one-half (2 & 1/2) hours beyond their normal quitting time or later and not having been allowed an unpaid thirty (30) minute supper period shall be paid one-half (112) hour extra for supper. In the event that It is necessary to work three (3) hours beyond their normal quitting time, the employees shall in addition be allowed fifteen (15) minutes to eat as the work load permits.

d. It is agreed and understood that any employee who abuses the fifteen (15) minutes allowed in paragraph a. will be subject to discipline in accordance with Section 19.

SECTION 7—SHOW UP TIME

All employees shall keep Employer advised at all times of their current address and phone number. In the event an employee is instructed to report for work and does report for such work but is not given any work the employee shall be paid for two (2) hours work for such loss of dm provided that after showing up the employee stands by for a time not to

exceed a minimum one (1) hour. If the employee is requested to stand by and does so for one (1) hour or more is given no work, the employee shall be paid for four (4) hours pay at his/her regular straight time rate of pay. Employees whose services are not needed on a regular work day must be notified the night before; otherwise such employee will be considered as having been instructed to report for work. The Employer shall call the worker at least one. (1) hour prior to the time the employee is ordered to report for work, in which case no show-up time shall be paid. In the event of rain at the employee's residence during the night, or over the weekend, the employee shall call the Employer to determine from the Employer whether or not the employee should report for work that day. The Employer shall have an authorized person and/or a telephone number to call at least one hour prior to the first scheduled starting time. No employee shall be discriminated against or laid off for justly claimed show-up time as provided in this section.

Employees who do not have a scheduled starting time must report Within one (1) hour of being called. Employees who do not report within the one (1) hour period, shall be paid from the time they actually start.

SECTION 8 - SCHEDULE OF WAGES

a. *Classification of Work*

	06/01/04
Ready-mix Drivers	$20.39 (plus any allocation of $1.81 increase)

b. *All New Employees.* The following minimum trainee rates shall apply to new employees with little previous experience and training:

1st 1,000 hours of work	-	80%
2nd 1,000 hours of work	-	90%

c. *New or Larger Equipment.* In the event larger or new type equipment is placed in service, an hourly rate shall be negotiated for same without delay. In the event of a dispute, same shall be referred to the grievance procedure of this Agreement within ten (10) days. The rate shall be effective on the date the equipment becomes operative.

d. *Overtime Computation.* Overtime past the hour and half hour will be computed by the 1/10th hour (6 minutes) as follows: 1 through 2 minutes - no pay; 3 through 8 minutes - 1/10th hour (6 minutes); 9 through 14 minutes - 2/10ths hour (12 minutes); 15 through 20 minutes - 3/10ths hour (18 minutes); 21 through 26 minutes - 4/10ths hour (24 minutes); 27 through 30 minutes - 5/10ths hour (30 minutes). Notwithstanding the above, employees who are required by the Company to standby on overtime shall be paid 3/10ths of an hour or 18 minutes pay.

e. *Casual Relief Employees.* Casual relief employees may be utilized for the purposes of fill-in for absent employees only. Such relief employees shall be required to comply with Section 3 -Hiring and Employment. Casual employees may be utilized during the period June 1 through October 31 only. A casual employee will be required to pay a monthly service fee (dues) to Perform work covered under this Agreement but will not be required to pay the Union

Membership .initiation fees until the employee has completed the probationary period in Section 4· Seniority, or the employee continues to perform work for the Employer beyond October 31 during the same Calendar year. If seniority is achieved, Health & Welfare contributions will be made according to Section 11·Health and Welfare. Contributions to the Supplemental Income 401(K) .Plan and Teamsters Pension Trust Fund will be made on the first hour of work. Nothing in this section shall modify or reduce the work afforded to senior employees as described in Section 4. Seniority.

f. These wage rates below are minimums and the Employer may pay any employee more.

*ADDITIONAL INCREASES—2005, 2006, 2007. and 2008**

It is agreed the following additional increases shall be effective in the amounts and on the dates set forth hereunder:

Month	Economic Package	Rate Adjustment
6/1/04	$ .31 per hour	$1.50 per hour
6/1/05	$1.00 per hour	
1/1/06		$ .50 per hour
6/1/06	$1.00 per hour	
1/1/07		$ .50 per hour
6/1/07	$1.00 per hour**	
1/1/08		$ .50 per hour

*The Union may elect at its option upon at least sixty (60) days written notice to the Employer to allocate the increases to wages and/or existing funded fringes.

**$.10 may be allocated to supplemental dues

Any increase in the Health and Welfare contributions to the Teamsters Benefit Trust Fund for. Plan I or Teamsters Benefit Trust Retirement Security Plan (if applicable) shall be provided for and allocated from the January 1 and/or June 1 increases. Any balance remaining after allocation to Health and Welfare and/or Retiree Health and Welfare (if applicable), the Union may elect at its option upon at least sixty (60) days' written notice to the Employer, be allocated to either wages, pension and/or the supplemental income 401k plan. One hundred seventy-three (173) hours per month shall be used in calculating a conversion from dollars per month to cents per hour for Health and Welfare and/or Retiree Health and Welfare (if applicable) purposes, In the event an increase in Health and Welfare and/or Retiree Health and Welfare (if applicable) is needed after the January 1 and/or June 1 increase, the straight-time wage rate shall be reduced to reflect the increase unless the Employer and Union meet to negotiate a lessor cost plan. No further allocation of the increase beyond the one hundred seventy-three (173) hour divisor shall be applied to wages or to any other existing funded fringe.

SECTION 9—HOLIDAYS

Effective May 1, 2004

The following holidays, when not worked, shall be paid for at eight (8) times the employee's straight time hourly rate: New Years Day, Presidents' Birthday, Memorial Day, Fourth of July, Labor Day,

Thanksgiving Day, Friday after Thanksgiving Day, Christmas Day, and the Employee's Birthday.

Employee's birthday shall be considered a holiday. However, the individual employee shall provide the Employer with not less than two (2) calendar weeks advance notice of the date upon which the employee's birthday falls, in, which event the employee shall be allowed to observe the holiday on the birthday, or such other day during the same calendar week. Where the individual employee fails to provide said two (2) calendar weeks advance notice of the date upon which the birthday falls, the date upon which the holiday shall be observed will be by mutual consent of the employee and Employer.

Effective January 1, 2005

The following holidays, when not worked, shall be paid for at eight (8) times the employee', straight time hourly rate: New Years Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Friday After Thanksgiving Day, Day Before Christmas, Christmas Day, and two (2) Floating Holidays.

The date upon which the Floating Holidays shall be observed will be by mutual agreement of the Employee and Employer. Employees who have established seniority by January 1 of each year shall be eligible for the two (2) Floating Holidays.

a. The above holidays shall be paid only if the employee:

1. Has established seniority under the terms of this Agreement.

2. An employee must work, or have reported for work, on the regularly scheduled work days immediately preceding and following said holidays, unless an absence is due to the express permission of the Employer or due to a bona fide illness accompanied by a doctors certificate.

b. If a specified paid holiday falls on a Saturday, the holiday shall be paid for as such at eight (8) times the employee's straight time hourly rate.

c. If a specified paid holiday falls on a Sunday, it shall be observed the following Monday, and the holiday shall be paid for as such at eight (8) times the employee's straight time hourly rate.

d. Employees who are eligible for holiday pay who are required to work on the above specified holidays shall receive double the regular straight time rate of pay in addition to holiday pay.

e. Employees ordered to work on holidays and who fall to report shall forfeit all holiday pay.

f. If a specified paid holiday falls during a paid vacation period, the employee shall have the option to receive an additional days pay or a day off with pay.

g. Employees absent due to illness or injury shall be paid for holiday pay for the remainder of the month and thirty (30) calendar days thereafter. Employees on leave of absence shall not receive holiday pay.

h. An employee with seniority rights who is laid off due to lack of work shall be paid for any holiday

which occurs within thirty (30) days after layoff and within thirty (30) days prior to recall. This subsection h. shall not apply to employees who voluntarily quit or who are discharged in accordance with Section 19.

SECTION 10—VACATIONS

a. Employees who have worked a total of twelve hundred (1200) hours since their last anniversary date shall qualify for a full vacation. Employees working less than twelve hundred (1200) hours since their last anniversary date shall receive a pro-rated vacation in accordance with j. below.

b. Overtime shall be computed as a part of the qualifying hours for vacation. Employees must not work during their vacation.

c. Employees are eligible for vacation as follows:

Years of Service	Vacation Hours	Days
1	48	6
2	64	8
3-4	80	10
5-9	120	15
10-19	160	20
20 and after	200	25

d. Employees shall receive their vacation pay on their anniversary date and vacation time shall be scheduled according to g. below. Vacation pay is to be paid at the straight time rate in effect at the time the vacation is paid.

e. Vacation selection shall remain posted year round.

f. Employees on lay off, off due to illness or industrial accident, discharged, or who quit, shall have their vacation pay pro-rated on the following basis:

All Hours Worked

	30 & Over	60 & Over	90 & Over	120 & Over	150 & Over
0-1 yr	1	2	3	4	5
2-3 yrs	1½	3	4½	6	7½
3-4 yrs	2	4	6	8	10
5-10 yrs	3	6	9	12	15
10-20 yrs	4	8	12	16	20
Over 20 yrs	5	10	15	20	25

	180 & Over	210 & Over	240 & Over	Max. Vac. Pay Not To Exceed
0-1 yr	6	7	8	6 day
2-3 yrs	9	10½	12	8 day
3-4 yrs	12	14	16 day	10 day
5-10 yrs	18	21	24	15 day
10-20 yrs	24	28	32	20 day
Over 20 yrs	30	35	40	25 day

g. *Selection and Posting*

The Employer shall post a list on the bulletin board, not later than February 15 of each year, for employees to sign up for their vacation period.

Vacation list shall be posted by plant not later than February 15th of each year. For choice of vacations, once a vacation list is posted, one week is allowed for the first twenty-five percent (25%) on the seniority list; one week allowed for the second twenty-five percent (25%) on the seniority list; one week allowed for the third twenty-five percent (25%) on the seniority list; and one week allowed for the fourth and final twenty-five percent (25%). Those not signing up in the correct quarter, shall lose their choice of vacation period and must take what is left. The Employer shall select the time of an employee's fifth (5th) week of vacation.

Not more than ten percent (10%) of the work force shall have vacation at the same time unless permitted by the Employer. However, those plants with more than ten (10) workers shall allow a minimum of two (2) workers to take vacation at the same time.

An employer and an employee may agree on a change in the vacation period of such employee after the vacation schedule has been posted, provided it does not affect the vacation period of any other employees on the vacation schedule.

h. In the, event an employee takes five (5) or more vacation days during a month and did not work eighty (80) or more hours in that same month to qualify for health and welfare coverage, he may

request the Employer report the vacation hours for health and welfare purposes. The employee is required to complete a "Vacation Hours for Health and Welfare" form available from his Supervisor.

SECTION 11—BENEFIT PROVISIONS

HEALTH AND WELFARE

Effective May 1, 2004 (payable in June), the Employer shall contribute to the Teamsters Benefit Trust Fund Plan for Plan I eight hundred sixty dollars ($860) per month for each employee who has been paid for eighty (80) hours or more during the calendar month. Any increase above this amount shall be according to Section 8.

Employees who are laid off due to lack of work (and did not work eighty [80] hours or more during the calendar month in which lay-off occurred), illness or on-the-job injury may be eligible for three (3) months of extended coverage. The Employer shall continue to pay the monthly contribution for health and welfare on employees who have been employed for at least six (6) Months and have qualified for coverage for at least six (6) months under Teamsters Benefit Trust Fund for Plan I by having worked eighty (80) hours or more each month.

A qualified employee shall not be eligible for more than three (3) months of extended coverage . In any twelve (12) month period irrespective of the number, frequency, and length of lay-off, illness or on-the-job injury. It is further understood that the extended coverage referred to above applies only in case of lay-off for lack of work and does not apply in cases of voluntary quit or discharge for cause. In order to be

eligible, the employee involved must contact and inform the Employer of his/her availability for work each week.

RETIREE HEALTH AND WELFARE

Effective 5/1 2004 payable in [payable in following month], the Employer shall contribute to the Teamsters Benefit Trust Retirement Security Plan an amount of one hundred forty-seven dollars and thirty-one cents ($147.31) per month for each employee who has been paid for eighty (80) hours or more during the calendar month. If there is an increase in the contribution rate, the Union may elect to allocate the necessary amount from the wage and fringe benefit increases effective January 1 or June 1. In the event there is an increase in the Retiree Health and Welfare premium after the January 1 or June 1 increase has been allocated, the straight-time rate shall be reduced to cover the increase. One hundred seventy-three (173) hours per month shall be used in calculating a conversion from dollars per month to cents per hour for health and welfare purposes.

PENSION

Effective May 1, 2004 (payable in June for May hours worked), the contribution to the Western Conference Teamsters Pension Trust Fund (W.C.T.P.T.F.) shall be increased twenty cents ($.20) per hour to provide the Program For Enhanced Early Retirement (PEER/84). This contribution shall be paid on the same basis as contributions for the basic plan. The total contribution. to the W.C.T.P.T.F. shall be $3.23 per hour ($3.03 + $.20 = $3.23). The contribution required to provide the Program For

Enhanced Early Retirement will not be taken into consideration for benefit accrual purposes under the Plan. The additional contribution for the PEER/84 must at all times be 6.5% of the basic contribution and cannot be decreased or discontinued at anytime.

Effective May 1, 2004—$3.23 per hour (plus any allocation of $1.81 increase)

The annual maximum contribution for each employee shall be two thousand eighty (2,080) hours.

Time paid for but not worked, such as holidays, vacation time, sick leave, funeral leave, Jury duty and show-up time, shall be considered as time worked for the purposes of this paragraph. Contributions shall be made on overtime hours.

SUPPLEMENTAL INCOME PLAN

The Employer covered by this Agreement shall contribute the amount stated below to the Supplemental Income Trust Fund for the account of each employee working under this Agreement for each hour. worked. For the purpose of this section, "hours worked" shall only include all actual hours worked, including shift differential, overtime, show-up time and pay for half and full days.

Effective May 1, 2004 - $3.53 per hour
(plus any allocation of $1.81 increase)

Payments to the Supplemental Income Trust Fund shall be made to the Northwest Administrators, Inc. Withdrawals of funds shall be based on the terms of the Trust Fund document.

The total amount due for each calendar month as provided in Section 11 · Pension and Supplemental income Plan, shall be, remitted in a lump sum not later than the tenth day of the following month. The Employer agrees to abide by such rules as may be established by the Trustees of said Trust Funds to facilitate the prompt and orderly collection of such amounts, and the accurate reporting and recording of such amounts paid on account of the employees. Failure to make the payments herein provided, within the time specified, shall be a breach of this Agreement

The Employer recognizes the Trustees of the aforesaid Trusts as their agents and representatives on the Board of Trustees for the purpose of maintaining and administering the benefits provided for herein.

The liability of the Employer for payments herein provided shall be limited to payments on behalf of his/her own employees.

Delinquent Employers

In the event the Employer covered by this Agreement is delinquent thirty (30) days in the payment of contributions to the Health and Welfare, Pension, and/or any other trust funds provided in this Agreement, it shall not be a violation of this Agreement, so long as such delinquency continues, if the Union withdraws the employees who are subject hereto from the performance of any work for the Employer and thereafter (if such employees are replaced) takes such economic action as is deemed

necessary until such delinquent payments are made; and such withdrawal or economic action shall not be considered a strike or work stoppage within the tens. of this Agreement, provided that the Union gives the delinquent Employer seventy-two (72) hours written notice of Its intention. The full cost of any legal or court action, Including any reasonable attorney's fees taken, is to be paid by the delinquent Employer. Whether or not any such action is taken, the delinquent Employer shall be liable to employees for any and all benefits which the employees would have received if the Employer had not been delinquent in the payment of such contributions.

SECTION 12—D.R.I.V.E.

The Employer agrees to deduct from the paycheck of all employees covered by this Agreement voluntary contributions to DRIVE. DRIVE shall notify the Employer of the amounts designated by each contributing employee that are to be deducted from his/her paycheck on a weekly basis for all weeks worked. The phrase "weeks worked" excludes any week other than a week in which the employee earned a wage. The Employer shall transmit to DRIVE National Headquarters on a monthly basis, in one check, the total amount deducted along with the name of each employee on whose behalf a deduction is made, the employee's social security number and the amount deducted from that employee's paycheck. The international Brotherhood of Teamsters shall reimburse the Employer annually for the Employer's actual cost for the expenses incurred in administering the weekly payroll deduction plan.

The Employer will recognize authorization for deductions from wages, if In compliance with state law, to be transmitted to the Union or to such other organization as the Union may request if mutually agreed to. No such authorization shall be recognized if in violation of state or federal law. No deduction shall be made which is prohibited by applicable law.

All disputes arising from this subsection shall be resolved in accordance with the grievance procedure provided in Section 20.

SECTION 13 · SUPPLEMENTAL DUES

Effective May 1, 2004 (payable in June), upon authorization as required by law, the sum of twenty cents ($.20) per hour for each hour worked or compensated shall be deducted from the employee's weekly paycheck as Supplemental Dues. In implementing the foregoing the parties have established the Construction Teamsters Health and Welfare Fund for Northern California as agent for the purpose of receiving and holding written authorizations and for receiving, holding and distributing such Supplemental Dues. All Supplemental Dues received by this Trust Fund for which no signed authorization exists shall be immediately returned to the Employer. All deductions made pursuant to this section shall be noted on the employee's statement of earnings.

The Supplemental Dues referred to above shall be transmitted to the Construction Teamsters Health and Welfare Trust Fund for Northern California concurrently with but not as a part of the Employers monthly Health and Welfare contributions provided in Section 11 of this Agreement. Any delinquency in

the payments of this Supplemental Dues shall be subject to the same liquidated damage, interest and other delinquency provisions applicable to contributions to the Construction Teamsters Health and Welfare Trust Fund for Northern California as provided in Section 11 of this Agreement, and III of the Subscriber Agreement.

The Union shall be responsible for furnishing the written authorization referred to herein. All costs incidental to receipt, administration and remittance of the Supplemental Dues shall be borne solely and entirely by the Union signatory hereto.

SECTION 14 - SICK LEAVE

Every employee covered by this Agreement who has been continuously employed by the Employer for a period of at least one (1) year, shall thereafter be entitled to six (6) days (forty-eight [48] straight time hours) sick leave with pay each year the employee qualifies. An employee shall have been "continuously employed" for one (1) year for the purpose of eligibility for sick leave, after working twelve hundred (1200) straight time hours in the Immediately preceding twelve month period. In no event shall an employee be eligible for any more than six (6) days sick leave (forty-eight [48] straight time hours) with pay during any sick leave anniversary year. Such leave shall be pro-rated on the basis of one day for each two hundred and forty (240) hours as provided in Section 10 of this Agreement.

Such sick leave with pay shall be applicable only in cases of illness or accident of the employee, or to care for a sick child, parent, spouse or domestic partner.

In cases of apparent abuse the Employer may require a doctor's certificate or other reasonable proof of illness. Sick leave shall be paid in the following manner:

a. The sick leave benefit allowance for illness or accident shall commence with the first work day's absence. Regular employees shall be eligible for sick leave pay If they are scheduled for work that day.

b. If any employee with two (2) or more years of employment uses less than six (6) days (forty-eight [46] straight. time hours) sick leave during his/her employment year, then the employee carries the six (6) days [48] straight time hours) sick leave or any unused portion of sick leave over to the succeeding employment year; provided, however, that the total maximum accumulative sick leave allowance shall not exceed twenty (20) days (one hundred sixty [160] straight time hours) in any one year

c. In industrial injury cases, or non-industrial injury or sickness cases, Workers Compensation or Disability Insurance benefits shall be paid separately; but in the event Workers Compensation payments or Disability Insurance payments cover all or part of the period during which sick leave is paid, the sum of the two shall not exceed the sick leave allowance herein provided.

d. Where the disabled employee is also eligible for and is receiving Unemployment Compensation Disability benefits or Workers Compensation' benefits, the sick leave benefits outlined in this Agreement shall be paid separately and shall be integrated with the Unemployment Compensation Disability benefits or Workers Compensation

benefits. The total benefits received shall not exceed the normal straight time earnings of the employee. Such payments are to be made on an integrated basis and the accrued sick leave benefits of the employee shall be charged only to the extent that actual payments are made by the Employer.

e. An employee shall be eligible to cash-out up to three (3) days of unused sick leave above the maximum accumulative sick leave allowance of twenty (20) days at the rate of one hundred ($100) per day. The employee shall notify the Employer in writing of such request within fifteen (15) days of the employee's anniversary date.

Any employee Who abuses sick leave may be subject to Section 19.

SECTION 15 - JURY DUTY

When an employee who has established seniority is unable to report for work on his/her assigned shift by reason of jury duty, the employee will, upon furnishing written proof of such service, be paid the difference between the jury pay, if any, and the amount the employee would have been paid if the employee had worked an eight hour day, with a maximum of thirty-five (35) days per year, at the appropriate rate of pay if scheduled to work.

Employees who are called for examination for jury duty or who serve on jury duty by being impaneled in a jury box and actively serving as a juror, shall be reimbursed the difference between jury pay, if any, and their straight time pay lost under the qualifications set forth below:

a. Employees called for jury duty or examination and excused by the court prior to 12:00 noon shall return to work for the balance of their day shift and shall be paid the difference between the jury pay or examination pay, if any, and their straight time pay lost.

b. Employees In a layoff status shall not be eligible for pay under this section:

SECTION 16 - LEAVES OF ABSENCE

a. *Approved Leave.* An employee desiring leave of absence from his/her employment shall secure written permission from both the Employer and the Union Executive Board. Except as otherwise provided in this section, the maximum leave of absence shall be for thirty (30) days and may be extended for like periods. Written permission for such extended periods shall be secured from both the Employer and the Union Executive Board. The first approved leave of absence plus approved extended leaves of absence shall not exceed a maximum time period of twelve (12) months. During an approved leave of absence the employee shall not engage in gainful employment. Leaves of five (5) days or less do not require Union approval.

An employee who is unable to work because of injury on the job shall be deemed to be on leave of absence. However, nothing contained herein shall be in conflict with the applicable seniority vacation provisions in this Agreement covering injured employees.

b. *Effect on Vacations and Holidays.* Time off due to an approved leave of absence other than

injury on the job, shall not be accumulative for vacation purposes. All regular employees off the job due to injury on the job shall accumulate vacation rights, holiday pay, and sick leave credit beginning with the date of injury on the job and continuing to the end of the month.

SECTION 17 · FUNERAL LEAVE

Employer agrees to pay employee at his/her regular straight time rate of pay for time lost from work up to but not to exceed three (3) days of not more than eight (8) hours per day to attend the funeral as a result of the death of the employee's spouse, domestic partner, parent, grandparent, mother-in-law, father-in-law, child, grandchild, brother or sister (to include foster or step).

SECTION 18 · MANAGEMENT

The management of the Employer's plant and the direction of the working forces, including the right to hire, suspend or discharge for proper cause, or transfer, and the right to relieve employees from duty because of lack of work, or for other legitimate reasons, except as may be limited by the provisions of this Agreement, is vested exclusively in the Employer, provided that these rights will not be used for the purposes of discrimination against any employee for union activity.

SECTION 19 · DISCHARGE/SUSPENSION

No employee shall be discharged or suspended without just cause. In the event of discharge or suspension without just cause, the employee may be reinstated with payment for all time lost.

A written notice of discharge or suspension shall specify the reason for discharge or suspension and shall be served upon the employee and the Union within forty-eight (48) hours after the discharge or suspension occurs. Discharges or suspensions to be effective must occur not more than ten (10) working days after the incident or ten (10) days from the day the Employer becomes aware or should have become aware of the incident providing the basis for the discharge or suspension. The forty-eight (48) hours here referred to are exclusive of Saturdays, Sundays and holidays.

If an employee Is given a warning notice rather than a discharge or suspension, such warning shall be in writing.

SECTION 20 - GRIEVANCE PROCEDURE

All disputes arising under this agreement shall be resolved in accordance with the following procedure:

a. Employees may, at their discretion, take up any dispute with the local management. However, any formal dispute shall be taken up by the Union with the Employer.

b. If the Union and the Employer are unable to resolve the dispute, it shall be referred to Federal Mediation and Conciliation Service for Mediation.

c. The Federal Mediation and Conciliation Service Mediator shall establish meeting dates, rules of procedure governing its proceedings, and adopt any forms necessary to administer the procedures prescribed by this section. Actions by the Mediator

shall be within the scope and terms of this agreement.

d. The Mediator shall first attempt to reach agreement between the parties after first conducting a hearing in which each party shall present its factual case. If the parties are unable to reach voluntary agreement on the matter, the Mediator shall issue an Advisory Opinion. The Advisory Opinion shall Indicate which party would prevail if the Mediator had made a binding decision.

e. If the dispute is referred to arbitration by either party, the parties agree that the Arbitrator shall be either Franklin Silver or another Arbitrator mutually agreed upon by both parties. The filing of a request for arbitration must be made within ten (10) days written notice to the other party (after issuance of an Advisory Opinion by the Mediator). Both Arbitrators will be asked to provide their first available dates for a hearing. The Arbitrator with the earliest date shall be designated for the first case submitted under this procedure; thereafter, the Arbitrators will be rotated, provided that in the event the designated Arbitrator does not have an available date within sixty (60) days of the referral, the other Arbitrator shall be used if he has dates within the sixty (60) day period. The parties shall develop a system to keep track of the order of Arbitrator selection. Pending a decision by the impartial Arbitrator, work shall be continued in accordance with the provisions of this agreement.

f. Decisions of the impartial Arbitrator shall be within the scope and terms of this agreement and shall be final and binding upon all parties hereto, provided such decision is specifically limited to the

matter submitted and does not amend any provisions of this agreement.

g. The expenses of employing an impartial Arbitrator including the cost of a court reporter shall be borne equally by the parties. However, should the Arbitrator and Mediator arrive at the same decision regarding the prevailing party, the payment of costs will be in accordance with paragraph h. below.

h. The non-prevailing party in the arbitration shall pay to the prevailing party all of the prevailing party's costs of the arbitration, including but not limited to, attorney's fees, arbitrator's fees, reporter's fees, transcripts and witness fees. In the event a dispute arises between the parties as to the identity of the prevailing patty of any of the costs to be paid or any other matter relating to this provision, said dispute shall be resolved by the Arbitrator who shall retain jurisdiction for such purposes.

i. Other than the Arbitrator's use in deciding if paragraph h. applies, the Mediator's Advisory Opinion shall be non-admissible and shall be treated as confidential settlement discussions between the parties.

j. It is understood and agreed by and between the parties that the following classes of disputes are not subject to the provisions of this section and that, except as provided in this agreement, each party shall have the right to take such legal and economic action as it may deem proper to resolve said disputes:

1. Disputes arising out of the failure of the Employer to meet the payroll for employees covered by this agreement;

2. Disputes arising because a payroll check issued by the Employer is dishonored; and

3. Disputes arising out of Section 1 - Recognition, c.

k. Proceedings pursuant to this section relating to discharges or suspensions must be brought to the attention of the Employer and the Union not more than ten (10) days after the alleged violation was committed. All other grievances shall be brought to the attention of the Employer and Union within sixty (60) days of the occurrence of the alleged violation.

In computing the ten (10) day or sixty (60) day period, the day on which the alleged violation was committed is not to be included. The last day of the period so computed is to be inducted, unless it is a Saturday, Sunday or holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday or holiday.

SECTION 21 - UNION ACTIVITY

a. No employee shall be discharged or discriminated against for Union activity or for representing the interests of the Union.

b. The Employer recognizes the right of the Union to designate plant stewards and alternates from the Employers seniority list.

c. The authority of the stewards and alternates so designated by the Union shall be limited to and shall not exceed the following duties and activities:

1. The investigation and presentation of grievances with his/her Employer or the designated company representative in accordance with the provisions of the collective bargaining agreement;

2. The transmission of such messages and Information which shall originate with, and are authorized by the Union or its officers, provided such messages and information:

   i. Have been reduced to writing, or

   ii. If not reduced to writing, are of a routine nature and do not involve work stoppages, slow downs, refusal to handle goods, or any other interference with the Employers business.

d. Stewards and alternates have no authority to take strike action, or any other action interrupting the Employers business, except as authorized by official action of the Union.

e. The Employer recognizes these limitations upon the authority of stewards and their alternates, and shall not hold the Union liable for any unauthorized acts. The Employer in so recognizing such limitations shall have the authority to impose proper discipline, including discharge, in the event the steward has taken unauthorized strike action,

slow down or work stoppage in violation of this Agreement.

SECTION 22 - STRIKES AND LOCKOUTS

There will be no strikes, including unfair labor practice strikes, sympathy strikes, slowdowns, stoppages of work or picketing by the Union or employees and there will be no lockouts by the Employer during the term of this Agreement, except as otherwise provided for herein. However, it will not be considered a violation of this Agreement and an employee will not be permanently replaced for refusing to pass through or work behind a lawful primary picket line established at any Employer property by a union, which picket line has been sanctioned by the Joint. Council of Teamsters No. 7, and also approved by the Bay Area Building Material Teamsters Committal, after fifteen (15) full working days of both withholding services and primary picketing at 'the Employer facility.

In addition, it will not be considered a violation of this Agreement and an employee will not be permanently replaced for honoring a lawful primary picket line sanctioned by Joint Council of Teamsters No. 7 or the Building Trades Council and/or the Central Labor Council, provided, however, picket lines sanctioned or authorized above must also be approved by the Bay Area Building Material Teamsters Committee, at any non-Employer property, except when the following situations arise at such non-Employer property: (1) a reserved gate system has been established; or (2) the Union has failed to provide the Employer with written notice of the lawful primary labor dispute twenty-four (24) hours before any employee refuses to enter property

when the picket line has been established; or (3) the picket line has been established by any union with a primary labor dispute with the Employer covered by this Agreement

The Union and the employees pledge that they will do everything within their authority to prevent the Employer and its employees from losing any work whatsoever to non-union or other competitors. If, after thorough scrutiny and consideration, strike sanction and primary pickets are granted, the Union will provide the Employer with as much notice as provided for in Item (2) in the above paragraph.

In the event that any employee or group of employees in the bargaining unit covered by this Agreement engages in any of the activities prohibited by this Section, the. Union agrees, upon notice by the Employer, immediately to take affirmative action and direct such 'employee or group of employees to cease such activity and resume work immediately.

The protection afforded employees herein shall not apply to jurisdictional disputes concerning work covered by this Agreement.

SECTION 23 · AGREEMENT BINDING UPON PARTIES

This Agreement shall be binding upon the heirs, executors, administrators, successors, purchasers and assigns of the parties hereto.

The Employer shall give written notice of the existence of this Agreement to any purchaser, successor or assignee of the operation covered by this

Agreement or any part thereof. The Union shall be notified in writing of any change in operations and shall be given reasonable opportunity to discuss the matter with the purchaser, successor or assignee before the actual change in operations takes place.

SECTION 24 – GENERAL PROVISIONS

a. *Merger, Lease or Purchase.* Employees when employed by the Employer as a result of the merger, lease or purchase of another firm shall be integrated with the new employer's work force for purposes of vacation credit, health and welfare, pensions, paid holidays and sick leave. The parties hereto shall not use a leasing device to a third party to evade this Agreement.

b. *Physical Examination.* Where the employee is required to take a physical examination by the Employer or as a requirement by law, the Employer shall bear the cost of said examination. Where the Employer requires physical examination, it shall pay for time involved in the examination at the employee's straight time or overtime rate of pay. However, the Employer shall pay for both the examination and the time involved in the examination of new hires. The Union may, if it believes an injustice has been done an employee, have said employee re-examined at the employee's expense and the results shall be given weight in the determination of the employee's physical ability.

c. *Country Work.* Drivers and helpers assigned to country work shall be paid at the regular schedule while in actual service and shall receive in. addition $15.00 road expense while out of town fifteen (15)

hours or more. They shall receive an additional $20.00 for lodging if out of town overnight.

d. *Starting Point.* Period of working time shall be from the time driver commences to check the equipment, start the truck or tractor at the starting point, until the time the driver returns to the same starting point, unless the employee is working under "country work."

e. *Uniforms/Protective Gear.* Employer agrees to furnish free of charge to their employees any and ail required uniforms, caps, and/or hats, boots, oil skins, rain gear, or hard hats. The upkeep and laundry of required uniforms shall be borne by the Employer. Rubber gloves and eye protection shall be made available to employees cleaning trucks with chemicals.

f. *Access to Premises.* The Business Agent of the Union shall have access to the Employer's premises during working hours for the purpose of posting notices, talking to the employees, and collecting due's, provided that such does not interfere with the normal course of work.

g. *Traffic Violations.* The Employer shall be held responsible for the violation of overweight, over-width and defective equipment unless the employee has acted contrary to the instructions of the Employer. Any traffic violations ordered by the Employer resulting in penalty of any kind shall be paid by the Employer. The employee is to be paid normal pay when appearing in court on behalf of the company.

h. *Voting Time.* The Employer shall abide by State Law Section 5699 covering voting time.

i. *Time Records.* The Employer shall provide a proper means of registering reporting and quitting time. Such records shall be accessible to the business representative of the Union during regular working hours. Employees shall punch or mark their own time cards.

j. *Pay Checks, Information.* An employee's pay check stub shall contain an itemized statement showing the breakdown of date, time, hours, overtime hours and all authorized deductions, Unless the employee checks in or put contrary to orders, the Employer shall not alter the employee's recorded time on the time card in any manner without clearing that alteration with the employee and the Union within forty-eight (48) hours.

Pay Checks, Weekly Pay. Each employee shall be paid wages in full each week unless other arrangements are made with the Union. Employees who quit or are discharged shall be paid in accordance with the law of the State of California.

k. *Garnishments.* In the event of notice to an Employer of a garnishment or impending garnishment, the Employer shall not take any disciplinary action against the employee for a period of seventy-two (72) hours for the first three garnishments, during which seventy- two (72) hour period the employee shall adjust the same. After three garnishments, disciplinary action including discharge may be taken if an employee fails to adjust the matter the Employer's. past practice shall

prevail. Any action taken by the Employer will be in conformance with the state and/or federal laws.

l. *Bulletin Boards.* The Employer shall maintain a bulletin board in a prominent location in the plant upon which board the Union shall have the privilege of posting necessary notices pertinent to the conduct of union business.

m. *Telephone Calls.* All employees shall be reimbursed for money spent for telephone calls involving company business. Particulars of all phone calls must be itemized and settled weekly.

n. *Supervisory Personnel.* No supervisory personnel shall operate fork lifts and related equipment in a yard, unless they are members of a Union covered by this Agreement.

o. *Bonds.* No employee shall be required by the Employer to deposit a cash bond with the Employer for any reason whatsoever.

p. *Attendance at Company Meetings.* No employee shall be required to attend a company meeting on employee's own time. An employee shall receive pay for attending mandatory safety meetings for the duration of the meeting with no less than two. (2) hours at the straight-time rate of pay. The starting time of safety meetings may begin at 5:00 a.m. In addition, the Employer may provide one day (maximum of eight hours) of customer-related training during the calendar year with employees paid at their straight-time rate of pay for attendance. If held on Saturday, the employee shall be paid the straight-time rate of pay until completion of forty (40) hours in the workweek.

q. *Drinking Water and Sanitary Facilities.* The Employer shall furnish and maintain sanitary facilities. The Employer shall also provide drinking water.

r. *Maintenance of Standards.* No employee receiving a higher rate of pay or superior conditions than provided in the contract shall receive any reduction in pay or modification of conditions during the life of the contract.

s. *Military Duty.* No employee shall lose seniority rating or credit by reason of being required to perform military duty during the term of this Agreement, and after returning, employee shall be restored to the position which was held at the time of leaving for such duty, provided employee is physically fit to perform the work.

t. *Return After Injury.* Whenever an employee who has been off work as a result of an injury or illness, work connected or not, is released by the doctor who is treating the employee to return to work, the Employer shall return the employee to the former job if in operation or to the first available job for which the employee is qualified. In such cases, the doctor shall be a qualified specialist as may be required.

u. *Clean Chutes.* If no time is given the driver by the Employer to wash chutes and rear of Mixer, the Employer shall have full responsibility for damage done as a result.

v. *Emergencies.* The Union will cooperate with the Employer in the event of an emergency. An emergency is defined as an accident, illness or

failure of an employee to report to work, a mechanical breakdown including a power failure, or energy curtailment or an Act of God that affects the processing or loading of materials.

w. *Operating Requirements.* No driver shall be required to use any equipment which is known to be defective. Employees shall report defects in equipment on a triplicate form to be provided by the Employer; one copy shall be retained by the employee, one by the Employer and one by the mechanic.

x. *Collections.* No employee shall deliver material without collecting for same unless the Employer assumes full responsibility for each collection. The employee shall turn in cash and/or checks after returning from C.O.D. deliveries and the Employer shall provide a written receipt for same.

y. *Drugs and Alcohol.* It is recognized by both parties that there is a social problem relative to the abuse of drugs and alcohol, and therefore agreed that employees will comply with the DOT (Department of Transportation) regulations.

z. *Safety Cooperation.* The Union shall cooperate with the Employer in the carrying out of all such Employer's safety measures and practices for accident prevention not in conflict with the provisions of this Agreement and in carrying out and adhering to all of the applicable state and federal safety laws.

aa. *Hazardous Waste Jobsites.* If an employee is required to work on a hazardous waste jobsite, the

Employer agrees to make available all required personal protective equipment. Personal protective equipment shall exceed minimum standards if the better quality equipment is available at a reasonable cost to the Employer.

SECTION 26—MARKETING CONDITIONS

The parties to this Agreement recognize the necessity of assuring the competitive position of the parties within the industry during the term of this Agreement. Consistent with that recognition, the parties will continually monitor the effectiveness of this Agreement relative to specific geographic or market areas and will endeavor, by mutual agreement to initiate such modifications to the Agreement during its term as may be necessary to assure the work opportunities of the employees and the competitive position of the Employer, provided however, any such geographic or market area modification, addendum or agreement which modifies this Agreement, in part or in whole, shall be subject to the ratification and approval of the affected membership in the geographic or market area to which the Agreement would apply. Failure by the membership to ratify any such agreement and/or modification, shall nullify it. It is further agreed that the Employer shall be precluded from unilaterally implementing any said agreement(s), modification(s) or addenda.

SECTION 26—EMERGENCY REOPENING

In the event of the declaration of war by Congress of the United States during the life of this Agreement, either party may reopen the same upon sixty (60) days' written notice and request renegotiations of

matters dealing with wages and hours. Upon failure of the parties to agree in such negotiations; either party shall be permitted all lawful economic recourse to support their request for revisions. If governmental approval of revisions should become necessary, all parties will cooperate to the utmost to attain such approval. The parties agree that the notice provided herein shall be accepted by all parties as to compliance with the notice requirements of applicable law, so as to permit economic action at the expiration thereof.

SECTION 27—TERM OF AGREEMENT

This Agreement shall remain in effect from May 1, 2004, until midnight April 30, 2008, and may be renewed thereafter either as is or with changes or amendments; but, if neither party to this Agreement, prior to sixty (60) days before the expiration date, notifies the other party in writing of its desire to rescind or make any changes or amendment in said Agreement then said contract will automatically be extended and renewed.

FOR THE UNION: TEAMSTERS UNION LOCAL 287	FOR THE EMPLOYER: GRANITE ROCK COMPANY
/s	/s
George Netto	Shirley Ow
12/17/04	December 14, 2004
Date	Date

BACK TO WORK AGREEMENT

Granite Rook Company and Teamsters Local 287 enter into the following agreement for the purpose of concluding the labor dispute presently in effect concerning the adopting of a successor Collective Bargaining Agreement.

1. The Company's current proposal for the agreement will be submitted by the Union with its recommendation for ratification by its affected membership immediately upon, but not before, the execution of this Back to Work Agreement.

2. The Company will return all striking employees and all employees who honored the picket lines to work in accordance with their seniority and the terms and conditions of the ratified agreement, as soon as is practicable following ratification.

3. The parties will withdraw any and all unfair labor practice charges, lawsuits, other administrative proceedings, grievances or claims they, and each of them, have filed respecting this activity or conduct of the other, their employees and/or members, or their supporters and sympathizers or the affected labor organizations that have risen out of or relate to the existing labor dispute and/or the negotiations preceding the strike.

4. The parties, and each of them, will not file or pursue any claims, either by way of grievances or legal proceedings of my kind or unfair labor practice charges, against the other, their employees and/or members, or their supporters and sympathizers or against any labor organization in the future arising

out of the existing labor dispute and/or the negotiations preceding the strike.

5. The Company will not institute or pursue any disciplinary action against any of its employees, including its employees who are not represented by the Union, based on or related to their activities or conduct in the course of the existing labor dispute, nor any proceeding against any labor organization, including but net limited to honoring the picket lines of the Union at locations of the Company's operations and/or job sites.

6. Nothing in this Agreement, however, shall prohibit the Union from enforcing the provisions of its Bylaws in the event that internal Union charges are filed by a Teamster member(s) against another Teamster member(s) alleging a violation of such Bylaws or the IBT Constitution related to the existing labor dispute and strike.

For the Union:	For the Employer:
_____	_____
George Netto	Shirley Ow
Teamsters Union Local 287	Granite Rock Company
Date:_____	Date:_____

OPPOSITION BRIEF

(5)

No. 08-1214

Supreme Court, U.S.
FILED
MAY 29 2009

IN THE

Supreme Court of the United States

GRANITE ROCK COMPANY,
Petitioner,

v.

THE INTERNATIONAL BROTHERHOOD TEAMSTERS & TEAMSTERS LOCAL 287,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DUANE B. BEESON
Counsel of Record
for Teamsters Local 287
BEESON, TAYER & BODINE
1404 Franklin Street
5th Floor
Oakland, CA 94612
(510) 625-9700

May 29, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether in an employer's action for breach of a collective bargaining agreement, a dispute over whether the agreement was ratified by the union's members is subject to arbitration upon demand by the Union under a clause in the agreement that requires arbitration of "(a)ll disputes arising under this agreement."

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTRODUCTORY STATEMENT	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	4
CONCLUSION	12
APPENDIX	
RESPONDENTS APPENDIX A	1a
RESPONDENTS APPENDIX B	10a

TABLE OF AUTHORITIES

CASES Page

14 Penn Plaza v. Pyett,
556 U.S. __, 129 S.Ct. 1456, 173 L.Ed 2d 398 (April 1, 2009) 11

Arthur Anderson LLP v. Wayne Carlisle,
__ U.S. __, 129 S.Ct. 1896 (Case No. 08-146, opinion filed May 4, 2009) 11

AT&T Technologies v. Communications Workers,
475 U.S. 643 (1986)..... 10

Binder v. Aetna Life Ins.,
75 Cal.App.4th 832 (1999)..... 11

Buckeye Check Cashing, Inc. v. Cardegna,
546 U.S. 440 (2006)..... 3-4, 7, 8, 9

First Options v. Kaplan,
514 U.S. 938 (1985)..... 11

Howsam v. Dean Witter Reynolds,
537 U.S. 79 (2002)..... 12

John Wiley & Sons v. Livingston,
376 U.S. 543 (1964)..... 10

Litton Financial Printing v. NLRB,
501 U.S. 190 (1991)..... 10

Nagrampa v. Mailcoups, Inc.,
469 F.3d 1257 (9th Cir. 2006)..... 3

Perry v. Thomas,
482 U.S. 483 (1987)..... 11

Prima Paint Corporation v. Flood & Conklin Mfg. Co.,
388 U.S. 397 (1967).....6, 7, 8, 9, 10

TABLE OF AUTHORITIES

Page

Sandvik AB v. Advent Int'l. Corp.,
220 F.3d 99 (3rd Cir. 2000).....6, 7, 8, 9, 10

Specht v. Netscape Communications Corp.,
306 F.3d 17 (2d Cir. 2002) 11

Steelworkers v. Warrior & Gulf Navigation,
363 U.S. 574 (1960)..... 5, 10

STATUTES

9 U.S.C. § 201, *et seq.* 8, 9

9 U.S.C. §§ 1-16 ..... 6, 8, 9

IN THE

Supreme Court of the United States

No. 08-1214

GRANITE ROCK COMPANY,
Petitioner,

v.

THE INTERNATIONAL BROTHERHOOD TEAMSTERS & TEAMSTERS LOCAL 287,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

INTRODUCTORY STATEMENT

The Petition presents two separate issues which arose out of a 2004 labor dispute between Petitioner and Respondent Teamsters Local 287. This opposition brief addresses only Petitioner's effort to overturn the decision of the court below that Petitioner must arbitrate its dispute with the Local Union "in its entirety." (Pet. A.19.) The other issue concerns allegations directed at the International Brotherhood of Teamsters, which is filing its own opposition brief.

STATEMENT OF THE CASE

Prior to the events in this case, Petitioner and Respondent Local 287 had an established collective bargaining relationship covering Petitioner's ready-mix drivers. In the late spring of 2004, when negotiations for a successor agreement were unsuccessful, Local 287 struck in support of its proposals. Early in the morning of July 2, 2004, following an all night negotiating session, the parties reached a tentative agreement, subject to ratification by the Local's members. The members met later that morning, and according to Petitioner, ratified the tentative agreement. Local 287 denies that a ratification vote was taken. The strike continued after July 2, following a break in the picketing over the long Fourth of July weekend.

On July 22, 2004, the Petitioner filed its First Amended Complaint for Injunctive Relief and Damages (Respondent Appendix (Resp. "A.")) alleging that the ongoing strike violated the no-strike clause of the agreement. The Complaint alleged in part that "Plaintiff is willing to participate in the grievance and arbitration proceedings provided in the Agreement, subject to all rights and defenses available to it." (Resp. App A, p.6a.) Local 287 on more than one occasion moved the District Court for arbitration on all issues in the case, including particularly the dispute as to whether the tentative collective bargaining agreement had been ratified.[1] The District

---

[1] By order dated July 18, 2005, the District Court denied Local 287's motion for arbitration, stating that it was "misplaced" in light of the unresolved issue as to whether ratification of the successor collective bargaining agreement had taken place. (Pet. A.102-103.)

Court allowed arbitration of Petitioner's breach of contract and damages claims, conditioned, however, upon a jury determination that the agreement had been ratified. (Pet.A.94-96.)

A jury trial was conducted in late April and early May, 2007, on the bifurcated issue of ratification. The jury found that the tentative agreement had been ratified by Local 287's membership (Pet. A.22-24), whereupon the District Court directed that the issues of contract violation and damages be arbitrated. (Pet. A.20-21.)

On appeal by the Union, the Ninth Circuit reversed the trial court's orders denying arbitration of the ratification dispute, and remanded the case to the District Court "with instructions that Granite Rock and Local 287 should be compelled to arbitrate their dispute in its entirety." (Pet. A.19.) The analysis of the Court of Appeals starts with recognition that "(t)he United States Supreme Court has drawn a distinction between challenges to an arbitration clause and challenges to an entire contract." (Pet. A.14.) Quoting this Court in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), the court below explains the distinction as follows (*id.*):

> [U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is consi-

---

By order dated November 18, 2005, the District Court directed arbitration of the issues of contract violation and damages, but ruled that the ratification dispute should be resolved by a jury. (Pet. A.82-96.)

By order dated February 16, 2007, the District Court rejected Local 287's repeated motion for arbitration that it filed on the basis of a recent *en banc* Ninth Circuit decision (*Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257 (9th Cir. 2006)). (Pet.A.60.)

> dered by the arbitrator in the first instance. 546 U.S. 440, 445-46 (2006).

In the present case, as the Ninth Circuit notes, "Granite Rock did not make an independent challenge to the arbitration clause." (Pet. A.15-16.) Responding to Granite Rock's argument that it did not agree to submit the issue of contract formation to an arbitrator, the decision below states (Pet. A.18):

> Here, both parties consented to arbitration; Granite Rock implicitly by suing under the contract containing the arbitration clause, and Local 287 explicitly by asserting the arbitration clause. Either might have had the right to a court determination of the formation issue had that right not been waived by asserting the validity of the contract.

REASONS FOR DENYING THE PETITION

1. The narrow and somewhat unique issue presented by the record in this case does not satisfy the "important question of federal law" standard for granting a writ of certiorari imposed by Rule 10(c) of this Court's Rules. Petitioner's statement of the question presented fails to reflect the carefully circumscribed scope of the decision below. Thus, asserting that it "never consented to have an arbitrator decide the existence of an agreement" (Pet. A.12), Petitioner invites this Court to rule that an arbitrator would be without authority to resolve the contract formation dispute (*i.e.*, whether the agreement had been ratified) so long as there is a controversy over the existence of the underlying contract. But the decision below holds that Petitioner did consent to arbitration of the ratification dispute. More specifically, the Ninth Circuit has ruled that Petitioner, as a mat-

ter of law, consented to an arbitrator's authority to resolve the ratification dispute by basing its underlying claim in its lawsuit on the existence and enforceability of a contract that included a provision granting an arbitrator authority to resolve "[a]ll disputes arising under this agreement." (Pet. A.19.) Petitioner does not challenge the decision of the court below that the broad language of the grievance and arbitration clause covers the dispute between the parties over contract formation.[2] Accordingly, the ruling that Petitioner requests this Court to review is that Petitioner, by bringing an action based on the existence of a contract, has necessarily assented to and is bound by the arbitration clause that concededly covers the issue of contract formation, at least where, as here, the union party to the bargaining relationship invokes that arbitration clause.

The issue on the merits of this case is accordingly both narrow and unusual. Issues involving the arbitrability of contract formation and/or validity normally arise where the party resisting arbitration denies the validity, existence or enforceability of the agreement. Here it is the other way around. Petitioner asserts, indeed stakes its case on the existence of the entire agreement, but refuses to accept any obligation to comply with the arbitration provision contained in the agreement. The very different and broader proposition asserted by Petitioner, backed by

---

[2] The decision of the Ninth Circuit comments that Petitioner "argue[d] briefly" that the "clause does not cover a dispute over formation," but the Court dismissed the suggestion, pointing out that "the arbitration clause is certainly 'susceptible of an interpretation' that covers the dispute"—all that is necessary to give the provision effect. (Pet. A.16, fn. 4, quoting from *Steelworkers v. Warrior & Gulf Navigation*, 363 U.S. 574, 582-83 (1960).)

citations of a number of appellate court decisions, is that an obligation to arbitrate cannot be established in any case, regardless of the alignment of the legal positions of the parties, where the formation of the contract in which the arbitration provision appears is disputed, unless and until a court finds the contract itself exists. None in the array of decisions cited by Petitioner, (Pet. pp. 14-17), with one exception[3], deals with a claimant who simultaneously relies on the existence of a contract and denies any obligation to comply with its arbitration clause. The circumstances of the issue in the present case are unusual, infrequent, and denial of the Petition would create no stir among contracting parties as to the role arbitration plays either in the areas of labor relations or commercial contracts.

2.(a) The decision below is fully consistent with this Court's application of the Federal Arbitration Act (FAA) (9 U.S.C. §§ 1-16). Section 2 of FAA provides in relevant part that "an agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Local 287 invoked this provision by filing motions to refer Petitioner's claim to arbitration. Section 4 provides in part that in an action to compel arbitration the court shall direct arbitration "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not an issue . . .". *Prima Paint Corporation v. Flood & Conklin Mfg. Co.*, 388 U.S. 397 (1967) is the seminal case applying the FAA to contract disputes in which a party seeks

---

[3] The exception is *Sandvik AB v. Advent Int'l. Corp.*, 220 F.3d 99 (3rd Cir. 2000), discussed *infra*, pp. 7-8

to avoid arbitration where the contract itself, but not the arbitration clause, is challenged. In *Prima Paint* the Court read the phrase "making of the agreement for arbitration" to refer to the arbitration provision, and not to other provisions in the contract or to the contract as a whole. Thus, the party resisting arbitration in *Prima Paint*—because the entire contract was invalid by reason of fraud in its inducement—was required to present that defense to an arbitrator, since his challenge was not restricted to the arbitration clause of the agreement. The pertinent holding in *Prima Paint* was summarized and endorsed most recently by this Court in *Buckeye Check Cashing, Inc. v. Cardegna*, *supra*, 546 U.S. 440, 445-46 (2006): "[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance."[4]

The Ninth Circuit has correctly applied the foregoing rulings in the present case. The underlying issue here is whether the agreement in its entirety was ratified and therefore in effect when the alleged contract violation occurred. Neither Petitioner nor the Union has suggested that the arbitration clause is

---

[4] Petitioner points out that this Court in *Buckeye* did not address cases where it is disputed whether "any agreement between the obligor and obligee was ever concluded." 546 U.S. 440, 444, fn. 1. In the same footnote, however, the *Buckeye* court also states that the decision does not speak to the issue in *Sandvik AB v. Advent Int'l. Corp.*, 220 F.3d 99 (3rd Circuit 2000). The caveat in footnote No. 1 reflects only the Court's normal reluctance to address more issues in a decision than is necessary to dispose of the case, a practice that neither argues for nor against granting certiorari in future cases presenting similar issues.

separately defective. As the court below concluded (Pet. A.19):

> The challenge here regards contract formation, Granite Rock does not challenge the arbitration clause independently, and both parties have consented to arbitration. As such, Granite Rock's claims against Local 287 should have been dismissed in favor of arbitration.

The correctness of this analysis is not affected by Petitioner's insistence that the existence of the contract involved here was controverted, unlike the contracts in *Prima Paint* and *Buckeye*, where the contracts were at least executed, although asserted by one of the parties in each case to be invalid. First, this Court has made explicitly clear that the term "contract" as used in FAA "includes putative contracts." 546 U.S. at 448. The contract sued upon by Petitioner was at least putative. Perhaps more important in the context of this case, the contract here was asserted by Petitioner to be in existence. Petitioner cannot have it both ways.

2.(b) *Sandvik AB. v. Advent International Corp.*, 220 F.3d 99 (3rd Circuit 2000) is the single decision cited by Petitioner that adopts its rationale in circumstances where the party resisting arbitration also acknowledges the existence and enforceability of the contract in which the arbitration clause appears. *Sandvik* is distinguishable, however, in that the contract involved there provided for arbitration pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (CREFAA), for which the FAA is the implementing mechanism. *See* 9 U.S.C. § 201, *et seq*. The Third Circuit in *Sandvik* reads Article II Section 3 of CREFAA require a court decision to determine whether an agreement to arbi-

trate is "'null and void, inoperative or incapable of being performed.'" (Resp. App. B, p.11a) In *Sandvik*, Defendant Advent International, the party opposing arbitration, asserted that the agreement was executed by an agent without authority to bind it, and was therefore null and void. In short, the decision in *Sandvik* is explained by the court's application of CREFAA, independently of the decisional law under FAA.

The *Sandvik* decision, however, also expounds at some length on the decisional law under FAA dealing with the appropriate forum to resolve disputes over contract validity and/or formation where arbitration provisions are involved. The decision concludes, in what appears to be dicta, that the proper forum is the judiciary, irrespective of whether the party advocating the validity of the contract resists or urges arbitration.

There are at least two reasons for not accepting the Third Circuit's conclusion. First, the *Sandvik* court based its decision on a distinction it attributes to the analysis in *Prima Paint*, namely that the severability and enforcement of the arbitration clause applies only to contracts that are voidable, but not with respect to contracts "that are asserted to be 'void' or non-existent." 229 F.3d at 105-108. According to the Third Circuit, the challenge to the contract in Prima Paint (invalid for fraud in the inducement) was voidable. That distinction, however, was rejected in the Buckeye decision. As the Court there explained, the application of the *Prima Paint* severability rule is controlling in the enforcement of an arbitration agreement irrespective of "whether the challenge at issue would have rendered the contract void or voidable." *Buckeye*, 546 U.S. at 446.

The *Sandvik* decision suffers from another defect. It does not face up to the inconsistency and unfairness of the position of a claimant that seeks the enforcement of a contract and concurrently denies that it is bound by the provision that provides for the procedure by which enforcement is to be accomplished. *Sandvik* repeats the theme that an arbitration clause in a contract cannot be found to exist if the contract in which it is embedded does not exist. As a generality that may be so, but a party that chooses to enforce a contract necessarily subscribes to its existence. In that situation, the abstract proposition relied on by the Third Circuit cannot be fairly applied. *Sandvik* has no answer to the Ninth Circuit's notation that Petitioner's right "to a court determination of the formation issue . . . [was] waived by asserting the validity of the contract." (Pet. A.18.)

2.(c) The starting point in Petitioner's justification for refusing to arbitrate the ratification dispute in this case is this Court's familiar language that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960), quoted in *AT&T Technologies v. Communications Workers*, 475 U.S. 643 (1986).[5]

---

[5] Petitioner also cites *Litton Financial Printing v. NLRB*, 501 U.S. 190 (1991) and *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964) for the same general proposition. These are decisions where the only challenge made is to the survival of arbitration clauses after the termination of the collective bargaining agreements in which they appear. As made clear in *Prima Paint, supra*, disputes limited to the validity (or indeed to the existence) of the arbitration provision are to be resolved by a court. Here, as in *Prima Paint*, the ratification dispute goes to the existence of the entire contract.

That proposition is fundamental and certainly is not disputed by the Respondent Union. But it is also undisputable that a party may be held to be bound by a contract and its obligations by its conduct as well as by its words or signature.[6] That is what happened here. By bringing a lawsuit to enforce the putative agreement, Petitioner manifested its assent to it. The Union's assent was by way of invoking the arbitration clause through appropriate motions. The Ninth Circuit's conclusion that the arbitration obligation was binding on Petitioner in these circumstances is clearly correct.

3. The ruling of the court below is fully consistent with and supported by the Court's recent decision in *14 Penn Plaza v. Pyett*, 556 U.S. __, 129 S.Ct. 1456, 173 L.Ed 2d 398 (April 1, 2009) sustaining the enforceability of an agreement for arbitration of a statutory right. The Court in *Pyett* made clear that it is not the nature or character of the issue to be arbitrated that is material to the right to arbitration, but rather whether the parties have legally bound themselves to arbitrate the particular issue. The notion that arbitrators lack competency to "resolve complex questions of fact and law" is put to rest in *Pyett*. Sl. Op. p. 19. We note, however, that the issue for arbi-

---

[6] State law, here California law, controls the issues "concerning the validity, revocability, and enforcement of contracts generally" in the application of FAA section 2. *Perry v. Thomas*, 482 U.S. 483, 492 , fn. 9 (1987). *See also Arthur Anderson LLP v. Wayne Carlisle*, __ U.S. __, 129 S.Ct. 1896 (Case No. 08-146, opinion filed May 4, 2009); *First Options v. Kaplan*, 514 U.S. 938, 944 (1985). California law binds the contracting parties when there is "[m]utual manifestation of assent, whether by written or spoken word or by conduct . . . " (emphasis added). *Specht v. Netscape*, 306 F.3d 17, 29 (2d. Cir. 2002), quoting from *Binder v. Aetna Life Ins.*, 75 Cal.App.4th 832, 848 (1999). *See also* the general discussion of California law on this point in *Specht* at pp. 28-30.

tration in this case—whether the relevant agreement was ratified—is one that is peculiarly appropriate for arbitration. The asserted ratification allegedly occurred during a meeting of Union members for a discussion of the agreement reached by the parties at the bargaining table. This is a setting well within the experience and expertise of a labor arbitrator to determine what was said, what was meant, and what, if anything, was concluded. As stated in *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 85 (2002):

> [F]or the law to assume an expectation that aligns (1) decisionmaker with (2) comparative expertise will help better to secure a fair and expeditious resolution of the underlying controversy - a goal of arbitration systems and judicial systems alike.

In the present case, the arbitration clause reflects the mutual desire and expectation of the parties that all disputes arising under the agreement would be resolved through arbitration. It would seem self-apparent that a party committed to the existence of such an agreement would be expected to comply with it.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petition should be denied.

Respectfully submitted,

DUANE B. BEESON
Counsel of Record
for Teamsters Local 287
BEESON, TAYER & BODINE
1404 Franklin Street
5th Floor
Oakland, CA 94612
(510) 625-9700

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

[Filed July 22, 2004]

Case No. C 04 2767 JW

GRANITE ROCK COMPANY,
Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, FREIGHT, CONSTRUCTION, GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 287 (AFL-CIO), and DOES 1 through 20, inclusive,
Defendants.

FIRST AMENDED COMPLAINT FOR INJUNCTIVE RELIEF AND DAMAGES

COMES NOW, the Plaintiff and complains against the Defendant as follows: JURISDICTION

1. This is a suit for injunctive relief and damages pursuant to Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a). This Court has jurisdiction under section 301 and under 28 U.S.C. § 1337.

PARTIES

2. Plaintiff Granite Rock Company ("Plaintiff") is, and at all times material herein, a California corporation engaged in the business of supplying ready

mixed concrete for commercial use with its principal office at 350 Technology Drive, Watsonville, California 95077. In the past twelve months, Granite Rock has purchased more than $50,000 worth of goods and supplies directly from points located outside the State of California. *Id.* Thus, Granite Rock is an "employer" as that term is defined in the Labor Management Relations Act of 1947, as amended.

3. Defendant International Brotherhood of Teamsters, Freight, Construction, General Drivers, Warehousemen and Helpers, Local No. 287 (hereinafter Defendant Local 287) is, and all times material hereto was, a voluntary, unincorporated association, commonly known as and doing business as a labor organization within the meaning of 29 U.S.C. § 185. At all times material hereto, Defendant Local 287 acted as a labor organization which represented certain Granite Rock Company employees at its San Jose facility referred to as the "Berryessa Plant." Defendant Local 287 is the collective bargaining representative for employees engaged as drivers at the Berryessa Plant. Defendant Local 287 maintains an office and place of business at 1452 No. 4th St., San Jose California 95112.

4. Plaintiff Granite Rock Company is, and at all times material hereto was, an employer in an industry affecting commerce as defined in 29 U.S.C. § 142(1) and (3) and 29 U.S.C. § 152.5(5), and within the meaning of 29 U.S.C. § 185.

5. Under section 301(a) of the Labor Management Relations Act (29 U.S.C. § 185(a)), United States district courts have original jurisdiction of actions arising out of violations of contracts between labor organizations, regardless of citizenship and amount.

CLAIMS FOR RELIEF

6. From the period of March 1, 1999 to April 30, 2004 Plaintiff and Defendant were parties to a collective bargaining agreement which sets forth the terms and conditions of employment for bargaining unit employees. (See Exhibit A to the declaration of Bruce Woolpert, "Woolpert Decl.").

7. In March 2004, Plaintiff and Defendant Local 287 commenced preliminary negotiations on a new agreement. Thereafter, the parties continued negotiations over the course of the next three months. On April 30, 2004, Plaintiff submitted a "Final Offer" to Defendant Local 287 for review. A "Revised Final Offer" was submitted on or about May 21, 2004. Defendant Local 287 rejected Plaintiff's offers. Subsequently, the parties continued negotiating for a successor agreement. One of the most significant issues in the negotiations was Plaintiff's total economic package proposal including wages and benefits.

8. In early June 2004, after the expiration of the former collective bargaining agreement, the bargaining unit employees at the San Jose facility went out on strike. Subsequently, the parties met again to negotiate regarding the outstanding issues with the key issue being the total economic package. On the evening of Thursday, July 1, 2004 Plaintiff and Defendant Local 287 met for negotiations. At approximately 4:00 a.m. on Friday, July 2, 2004 the parties reached agreement on terms for a new four-year collective bargaining agreement covering the term of May 1, 2004 through April 30, 2008. At the conclusion of the session, George Netto, Business Representative, Teamsters Local 287, stated that the contract would be presented to the Union members for ratification at 9:00 a.m. that same day (Friday, July

2, 2004). He also stated that the pickets would be removed.

9. The parties agreed to maintain the same contract language as the previous agreement except as noted in Plaintiff's July 2, 2004 "Final Offer." (See July 2, 2004 "Final Offer," Exhibit B, "Woolpert Decl."). The grievance and arbitration provisions set forth in Section 20 of the prior collective bargaining agreement remain the same in the new Agreement with one exception not relevant to this matter. At the conclusion of the session, the parties discussed preparing a Back to Work Agreement at a later date. During subsequent conversations regarding the Back to Work Agreement, the parties agreed that any such agreement would be subject to the grievance procedure.

10. On or about 9:00 a.m. on Friday, July 2, 2004 a ratification meeting was held with the Granite Rock Company bargaining unit employees. At the meeting, the agreement was presented orally to the Local 287 members and a ratification vote was held. Plaintiff is informed and believes that the employees voted on the contract and approved it. That same day, several employees contacted Plaintiff regarding returning to work. Later that day, Mr. Netto contacted Plaintiff and stated the Agreement was ratified.

11. The portions of the Agreement which are material to this Complaint are Section 19 ("Discharge/ Suspension"), Section 20 ("Grievance Procedure") and Section 22 ("Strikes and Lockouts"). Section 19 provides a just cause standard for discharge and suspension of bargaining unit employees. Section 20 provides a compulsory grievance and arbitration procedure for the settlement of any disputes between Plaintiff and Defendant arising from the application

of any provisions of the Agreement or affecting the relation of the employees and the Employer. Unresolved grievances may be submitted to an Arbitrator specifically selected by the parties. The decision of the Arbitrator is final and binding on the parties. Section 22 of the Agreement concerns the circumstances in which employees may lawfully strike under the Agreement.

12. It is well settled that in exchange for a compulsory grievance and binding arbitration procedure, a union signatory to such a collective bargaining agreement is obligated not to strike over a dispute arising out of the application or interpretation of the Agreement.

13. On Monday, July 5, 2004, in repudiation of the collective bargaining agreement and in violation of its provisions, Defendant Local 287 called union members at their homes and instructed, authorized, instigated, and encouraged them not to return to work. The next day (Tuesday, July 6, 2004), Defendant Local 287 informed Plaintiff that its members would not return to work until Plaintiff executed a Back to Work Agreement guaranteeing amnesty for its employees and for employees at Plaintiff's other facilities in three counties covered under separate collective bargaining agreements with different unions. Thus requiring Plaintiff to drop its previously issued grievances against the respective unions for violation of the no-strike provisions of their individual labor contracts as a condition of reaching agreement. To date, Local 287 members remain engaged in an unlawful strike in clear violation the Agreement. Additionally, Plaintiff's employees covered under separate collective bargaining agreements with different

unions are refusing to cross the Teamsters' picket line at Plaintiff's other facilities.

14. To date, Defendant Local 287 has refused to abide by the terms and conditions of the collective bargaining agreement between it and Plaintiff. The agreement includes a valid no-strike clause that precludes a continuation of the current dispute. Plaintiff has duly performed all conditions of the agreement on its part to be performed such as calling people to work shifts consistent with the agreement. By its actions and conduct alleged herein, Defendant has breached the Agreement between Plaintiff and Defendant, and, in particular, the compulsory grievance and arbitration provisions and Defendant's no-strike obligation inherent in the Agreement.

15. As a result of the actions of Defendant Local 287, its officers, agents, and employees, Plaintiff has been deprived of the benefits of said collective bargaining agreement it negotiated with Defendant Local 287a Without said collective bargaining agreement, Plaintiff is deprived, *inter alia*, of the benefits of the no-strike protections contained in the contract as well as the labor peace and stability attendant to a collective bargaining agreement.

16. Plaintiff is informed and believes that said strikes will continue unless judicial relief is obtained.

17. Plaintiff is willing to participate in the grievance and arbitration proceedings provided in the Agreement, subject to all rights and defenses available to it.

18. By reason of the aforesaid breach of the Agreement, Plaintiff has been unfairly and improperly prevented from conducting its normal business activities of supplying ready mix concrete for its

commercial customers. Plaintiff has suffered and will continue to suffer great and irreparable damage by reason of Defendant's actions in that Plaintiff will not be able to conduct its normal business activities.

19. Plaintiff is informed and believes that Defendant will continue said unlawful work stoppage unless restrained and enjoined by this Court. Plaintiff has no plain, speedy or adequate remedy at law, and unless Defendant is immediately restrained from continuing its unlawful strike action, Plaintiff will continue to sustain great and irreparable injury and damage as herein alleged. Plaintiff's business is one that is extremely competitive and, therefore, requires reliability and continuity of service on a daily basis; any disruption of such service will cause irreparable injury to Plaintiff's ability to maintain its market share. If Plaintiff is unable to provide concrete to complete projects that have already commenced, its customers must obtain it from Plaintiff's competitors. The nature of such purchases makes it unlikely that customers will return. Further, as a result of the strike, key Santa Clara County Public Works construction projects have been delayed including roadway improvements scheduled to begin. Tuesday, July 13, 2004. This not only is causing irreparable harm to Granite Rock, but poses safety concerns for Santa Clara County. A prolonged inability to provide concrete will likely cause a devastating loss of these long term construction projects, which are the lifeblood of Plaintiff's business.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays as follows:

1. That the officers, agents, representatives, employees and members, and all other persons acting at

the direction of, or in concert with, said Defendant, be permanently enjoined and restrained from engaging in any of the following activities during the lesser of (1) the pendency of this action or (2) the life of the Agreement:

> engaging in any strike, slowdown or other concerted refusal to perform work in violation of the parties' collective bargaining agreement concerning any dispute, complaint or grievance with Plaintiff regarding the discipline and/or amnesty of striking employees.

2. That pending a final determination in this action, this Court make an Order directing Defendant to withdraw any orders or directions to employees of Plaintiff that said employees should engage in a cessation of work concerning any dispute, complaint or grievance with Plaintiff regarding the discipline and/or amnesty of striking employees.

3. That this Court make an Order directing Defendant herein to show cause at a time and place appointed in said Order why Defendant and all others referred to in Paragraph 1 of this prayer should not be enjoined and restrained during the lesser of (1) the pendency of this action or (2) the life of the Agreement from doing any of the things hereinabove mentioned in Paragraph 1.

4. That a Temporary Restraining Order be granted Plaintiff, enjoining and restraining Defendant, and all others referred to in Paragraph 1 of this prayer, from doing any of the things and acts hereinabove mentioned in Paragraph 1 *and* to do the things mentioned in Paragraph 2, pending the hearing of said Order to Show Cause.

5. That upon the hearing of said Order to Show Cause, a Preliminary Injunction be granted herein, enjoining and restraining Defendant and all others referred to in Paragraph 1 during the lesser of (1) the pendency of this action or (2) the life of the Agreement.

6. For damages according to proof;

7. That Plaintiff be allowed its costs of suit and attorneys' fees herein incurred;

8. For such other and further relief as the Court may deem proper and just.

Dated: July 22, 2004

/s/ Deborah A. Rice
DEBORAH A. RICE
LITTLER MENDELSON
A Professional Corporation
Attorneys for Plaintiff
GRANITE ROCK COMPANY

APPENDIX B

UNITED NATIONS CONFERENCE ON
INTERNATIONAL COMMERCIAL ARBITRATION

CONVENTION
ON THE RECOGNITION AND ENFORCEMENT
OF FOREIGN ARBITRAL AWARDS

UNITED NATIONS
1958

CONVENTION
ON THE RECOGNITION AND ENFORCEMENT
OF FOREIGN ARBITRAL AWARDS

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of

another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than

are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appoint-

ment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that. if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to he relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which

an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for con-

stitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment ;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary- General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signatures and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall he equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

OPPOSITION BRIEF

FILED
MAY 29 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-1214

IN THE

Supreme Court of the United States

GRANITE ROCK COMPANY,
Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

BRADLEY T. RAYMOND
INTERNATIONAL BROTHERHOOD OF TEAMSTERS
25 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 624-6945

STEPHEN P. BERZON
PETER D. NUSSBAUM *
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

* Counsel of Record

May 29, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Section 301(a) of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. §185(a) ("Section 301"), creates federal jurisdiction for "suits for violation of contracts" between unions and employers. Can a claim for tortious interference with such a contract be brought against a union or employer that is neither a party to the contract nor has any legal rights or obligations that arise from the contract?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	3
CONCLUSION	12

TABLE OF AUTHORITIES

FEDERAL CASES	Page
Aacon Contracting Co. v. Association of Catholic Trade Unionists, 276 F.2d 958 (2d Cir. 1960), *aff'g and adopting* 178 F.Supp. 129 (E.D.N.Y. 1959)	5
Bowers v. Ulpiano Casal, Inc., 393 F.2d 421 (1st Cir. 1968)	5
Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176 (7th Cir. 1993)	4
Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983)	5, 9
Complete Automobile Transit, Inc. v. Reis, 451 U.S. 401 (1981)	4, 7
Granite Rock Co. v. International Brotherhood of Teamsters Local 287, 546 F.3d 1169 (9th Cir. 2008)	10
Greenblatt v. Delta Plumbing & Heating Corp., 68 F.3d 561 (2d Cir. 1995)	5, 6
Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1975)	6
International Union, Mine Workers v. Covenant Coal Corp., 977 F.2d 895 (4th Cir. 1992)	5, 9
International Union, United Automobile Workers v. N. Telecom, Inc., 434 F.Supp. 331 (E.D. Mich. 1977)	10
Local 1976, United Brotherhood of Carpenters v. NLRB, 357 U.S. 93 (1958)	9
Lodge 76, International Association of Machinists v. Wisc. Employment Relations Commission, 427 U.S. 132 (1976)	9
Loss v. Blankenship, 673 F.2d 942 (7th Cir. 1982)	5, 9

TABLE OF AUTHORITIES—Continued

	Page
NLRB v. Drivers Local Union No. 639, 362 U.S. 274 (1960)	9
Painting & Decorating Contractors Associate of Sacramento v. Painters & Decorators Jt. Council of the East Bay Counties, 707 F.2d 1067 (9th Cir. 1983)	6
Service, Hospital, Nursing Homes & Public Employees Union, Local No. 47 v. Commercial Prop. Services, Inc., 755 F.2d 499 (6th Cir.), *cert. denied*, 474 U.S. 850 (1985)	5, 6, 9
Sheet Metal Workers International Association, Local No. 359 v. Ariz. Mechanical & Stainless, Inc., 863 F.2d 647 (9th Cir. 1988)	10
Smith v. Evening News Association, 371 U.S. 195 (1962)	6
Teamsters Local 287, 347 N.L.R.B. No. 32 (2006)	10
Teamsters Union Local 287 v. NLRB, 293 Fed.Appx. 518 (9th Cir. 2008)	10
Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957)	4, 7
Textron Lycoming Reciprocating Engine Division, Avco Corp. v. United Automobile Workers, 523 U.S. 653 (1998)	4
United Food & Commercial Workers Union v. Quality Plus Stores, Inc., 961 F.2d 904 (10th Cir. 1992)	5, 9
Wilkes-Barre Publ'g Co. v. Newspaper Guild, Local 120, 647 F.2d 372 (3d Cir. 1981)	5

TABLE OF AUTHORITIES—Continued

	Page
Wooddell v. International Brotherhood of Electric Workers, Local 71, 502 U.S. 93 (1991)	6
Xaros v. U.S. Fidelity & Guaranty Co., 820 F.2d 1176 (11th Cir. 1987)	5
FEDERAL STATUTES	
29 U.S.C. §§151 *et seq*	8
29 U.S.C. §158(b)(4)(B)	8
29 U.S.C. §185(a)	*passim*
29 U.S.C. §187	8
FEDERAL RULES	
Fed. R. Civ. Proc. 12(b)(6)	3
MISCELLANEOUS	
92 Cong. Rec. 838 (1946)	7
Prosser & Keeton on Torts: Lawyer's Edition (W. Page Keeton ed., 5th ed. 1984)	7-8
Restatement (Second) of Torts (1977)	7
S. Rep. No. 80-105, *reprinted* in 1 NLRB, Legislative History of the Labor-Management Relations Act, 1947 (1985)	7

IN THE

Supreme Court of the United States

No. 08-1214

GRANITE ROCK COMPANY,
Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case arises from a strike against Petitioner, Granite Rock Company ("Granite Rock"), by Teamsters Local 287 ("the Local" or "Local 287"). Granite Rock instituted legal proceedings against Local 287 alleging that the Local had entered into a collective bargaining agreement ("CBA") with Granite Rock on July 2, 2004, and that the Local's continuation of a strike beyond that date constituted a breach of the CBA's no-strike clause. Granite Rock alleged a breach of contract claim against Local 287 pursuant to Section 301, which provides that:

> Suits for *violation of contracts* between an employer and a labor organization . . . may be brought in any district court of the United States . . . .

Emphasis added.

Respondent, International Brotherhood of Teamsters ("International"), was not initially named as a defendant. The International is not a party to the CBA between Granite Rock and Local 287 that the Local allegedly breached, nor is it a party to any other CBA with Granite Rock. Just before the trial of Granite Rock's *breach of contract* claim against Local 287 was to commence, Granite Rock filed an amended complaint that attempted to plead a breach of contract claim against the International.[1] That claim was dismissed by the District Court, which granted Granite Rock's request that it be allowed to amend its breach of contract claim against the International to allege clearly its theory that the International was an "undisclosed principal" to the CBA.[2] Instead of amending the complaint in that manner, Granite Rock abandoned any breach of contract claim against the International and alleged for the first time that the International had *tortiously interfered* with the CBA by encouraging Local 287 to continue its strike beyond July 2, 2004. Pet. App. 110-26.

In response to the International's subsequent motion to dismiss, the District Court held that the claim against the International had to be dismissed because Granite Rock could not pursue a claim for tor-

---

[1] Ninth Circuit Excerpts of Record at 112.

[2] Ninth Circuit Supplemental Excerpts of Record at 32-34.

tious interference pursuant to Section 301.[3] A three-judge panel of the Ninth Circuit (Circuit Judges Gould and Bea, and District Judge Sedwick) unanimously affirmed the dismissal, finding that the plain language and legislative history of Section 301 make clear that Congress intended to provide only a federal claim to enforce rights and duties created in agreements between unions and employers and not a tort claim for interference with advantageous economic relations. By so holding, the Ninth Circuit joined eight other circuits, and rejected a nearly thirty-year-old outlier decision by the Third Circuit. Granite Rock sought rehearing *en banc*. No judge of the Ninth Circuit requested a vote on the petition for rehearing.

REASONS FOR DENYING THE PETITION

In Section 301, Congress created a federal claim for breach of contract. Nine circuits have clearly held that Section 301 does not encompass tort claims for interference with contract. The only contrary ruling is a 1981 Third Circuit decision whose rationale has been rejected by every other circuit that has considered the issue. The Ninth Circuit's recent decision merely adds to the overwhelming weight of authority that has existed for many years. The consensus that Section 301 does not authorize tort claims is compelled by the plain language of that section and has not resulted in labor-management strife or left employers and unions without an adequate remedy when breach of a CBA occurs. Hence, the Petition

---

[3] Because the International was dismissed pursuant to Fed. R. Civ. Proc., Rule 12(b)(6), none of the factual claims in Granite Rock's Petition to this Court regarding the International has been established.

should be denied as to the question it presents regarding Section 301.

1. Section 301 creates a federal claim for relief for "[s]uits for *violation of contracts* between an employer and a labor organization." (Emphasis added). This Court has found that Section 301 "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements." *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 451 (1957). But the Court has cautioned that its construction of Section 301 does "not envision any freewheeling inquiry into what the federal courts might find to be the most desirable rule." *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 406 (1981) (quotation marks and citation omitted). *See Textron Lycoming Reciprocating Engine Division, Avco Corp. v. United Automobile Workers*, 523 U.S. 653, 656-58 (1998) (scope of Section 301 constrained by the language of the statute).

The question presented by this case is whether the federal common law that courts are authorized to develop under Section 301 includes a claim for tortious interference with contract. The Ninth Circuit held that such a tort claim is not part of the federal common law of collective bargaining agreements under Section 301, explaining that the statute is not an invitation to create "an independent body of tort law." Pet. App. 11 (citing *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1180 (7th Cir. 1993) ("The common law to be made is a law of contracts, not a source of independent rights, let alone tort rights; for section 301 is . . . a grant of jurisdiction only to enforce contracts.")).

In so holding, the Ninth Circuit joined eight other circuits that do not permit tortious interference

claims to be brought pursuant to Section 301. *See, e.g., Bowers v. Ulpiano Casal, Inc.*, 393 F.2d 421, 423 (1st Cir. 1968); *Aacon Contracting Co. v. Ass'n of Catholic Trade Unionists*, 276 F.2d 958 (2d Cir. 1960), *aff'g and adopting* 178 F.Supp. 129, 129-30 (E.D.N.Y. 1959); *Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561, 572 (2d Cir. 1995); *Int'l Union, Mine Workers v. Covenant Coal Corp.*, 977 F.2d 895, 897 (4th Cir. 1992); *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 500-01 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983); *Serv., Hosp., Nursing Homes & Public Employees Union, Local No. 47 v. Commercial Prop. Servs., Inc.*, 755 F.2d 499, 505-06 (6th Cir.), *cert. denied*, 474 U.S. 850 (1985); *Loss v. Blankenship*, 673 F.2d 942, 947-48 (7th Cir. 1982); *United Food & Commercial Workers Union v. Quality Plus Stores, Inc.*, 961 F.2d 904, 905-06 (10th Cir. 1992); *Xaros v. U.S. Fid. & Guar. Co.*, 820 F.2d 1176, 1181 (11th Cir. 1987).[4]

Only the Third Circuit has reached a different conclusion. *Wilkes-Barre Publ'g Co. v. Newspaper Guild, Local 120*, 647 F.2d 372 (3d Cir. 1981). That decision failed to acknowledge or discuss prior circuit holdings to the contrary and was immediately criticized. *See Pratt-Farnsworth*, 690 F.2d at 501. Nearly thirty years later, no other circuit has adopted the Third Circuit's reasoning.

2. Petitioner attempts unpersuasively to inject uncertainty, where none exists, regarding the rulings by those nine circuits that do not permit tortious interference claims under Section 301. The alleged uncertainty is based on the fact that some of those courts

---

[4] As the Ninth Circuit correctly recognized, the Eleventh Circuit initially appeared to agree with the Third Circuit but subsequently clarified its position in *Xaros*. Pet. App. 10, n.2.

have simply stated, in a short-hand manner, that a Section 301 claim cannot be brought against a party that is not signatory to the CBA; other circuits have explained, more fully and properly, that "[A] district court does not have subject matter jurisdiction over a non-signatory to a collective bargaining agreement, *where no rights or duties of the non-signatory party are stated in the terms and conditions of the contract.*" *Commercial Prop. Servs., Inc.*, 755 F.2d at 506 (emphasis added); *accord, Greenblatt*, 68 F.3d at 572.

This difference in articulating why Section 301 does not encompass a claim for tortious interference does not constitute the type of split among the circuits that warrants review of the decision below, since it has long been clear that a Section 301 breach of contract claim *can* properly be brought by or against non-signatories to a CBA, but only if they have rights or obligations that arise from the contract itself.[5] As the Ninth Circuit noted, "some variations in phrasing" do not affect the conclusion that "the circuits are almost unanimous in rejecting LMRA jurisdiction over a claim such as Granite Rock's claim against [the International]." Pet. App. at 9. The Ninth Circuit's opinion merely contributes to the overwhelming uniformity of law on the issue presented by the Petition.

---

[5] *See, e.g., Smith v. Evening News Ass'n*, 371 U.S. 195, 200 (1962) (union members can enforce their rights under CBA); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1975) (same); *Wooddell v. Int'l Bhd. of Elec. Workers, Local 71*, 502 U.S. 93, 100-01 (1991) (member can bring suit under Section 301 to enforce rights created in union constitution); *Painting & Decorating Contractors Assoc. of Sacramento v. Painters & Decorators Jt. Council of the East Bay Counties*, 707 F.2d 1067 (9th Cir. 1983) (joint labor-management committee created by CBA to administer its terms is proper defendant in Section 301 suit).

3. The nearly unanimous interpretation of Section 301 followed by the Ninth Circuit is correct. Before Section 301 was enacted, employers often faced difficulty suing signatory unions for breach of contract because, as unincorporated associations, labor organizations were not proper defendants in many states' courts. Thus, the Congressional concern motivating Section 301 was to create "a procedure for making such agreements enforceable in the courts." *Lincoln Mills*, 353 U.S. at 453. Section 301 ensures that unions, as well as employers, can be sued for breach of contract, thereby "'establish[ing] a mutual responsibility when the collective-bargaining process has resulted in a contract.'" *Complete Auto Transit*, 451 U.S. at 408 (quoting 92 Cong. Rec. 838 (1946) (statement of Rep. Case)). By making labor contracts enforceable in federal court, Section 301 "promote[s] industrial peace through faithful performance by the parties [of their] collective agreements." *See* S. Rep. No. 80-105, at 16 (1947), *reprinted in* 1 NLRB, Legislative History of the Labor-Management Relations Act, 1947, at 422 (1985).

Interference with contract is not part of the law of contracts but rather is one of several torts relating to interference with advantageous economic relations.[6]

---

[6] Restatement (Second) of Torts, Div. Nine, p. 1 (1977); *see id.*, Ch. 37 Introductory Note, p. 5 (there are "several forms of the tort" of interference with existing or prospective contractual relations and they "are often not distinguished by the courts"); *id.* §766 cmt. c ("inducing breach of contract is . . . but one instance . . . of protection against improper interference in business relations"); *id.* §§766-766C (describing various related torts); Prosser & Keeton on Torts: Lawyer's Edition §129 at 978 (W. Page Keeton ed., 5th ed. 1984) ("The law of interference with contract is thus one part of a larger body of tort law aimed at protection

In the realm of labor-management relations, Congress dealt with such interference explicitly in the LMRA. In 1947, Congress amended the National Labor Relations Act, 29 U.S.C. §§151 *et seq.*, to include not only Section 301 for breach of contract claims but also certain labor-related tort-like claims for interference with business relations. *See* 29 U.S.C. §158(b)(4)(B) ("Section 8(b)(4)(B)") (creating unfair labor practice if union strikes, threatens or coerces a third party to force it to cease doing business with an employer); 29 U.S.C. §187 ("Section 303") (creating federal court claim for an employer injured by such an unfair labor practice).[7] This Congressional regulation of labor-related torts is reflected in the subsequent deletion of Chapter 38, "Labor Disputes," from the Division of the Restatement of Torts dealing with "Interference with Advantageous Economic Relations":

> Obviously, the law of labor disputes and their effect in interfering with contractual relations has ceased to be regarded as part of Tort Law and has become an integral part of the general subject of Labor Law, with all of its statutory and administrative regulations, both state and federal.

Restatement (Second) of Torts, Div. Nine Introductory Note (1977).

There is simply no indication that Congress intended Section 301, which deals with "violation of

---

of relationships, some economic and some personal." (citations omitted)).

[7] Granite Rock correctly recognized that the activity alleged against the International was not encompassed by Sections 8(b)(4)(B) and 303 and, therefore, it neither filed an unfair labor practice charge against the International with the National Labor Relations Board, nor alleged a Section 303 claim against the International in the District Court.

contracts," to authorize the federal courts to develop a common law of torts to supplement the explicit and limited tort-like claims for relief created by other sections of the same statute that enacted Section 301; and it is irrelevant that the tort-like claims authorized by Congress do not include the tort claim that Granite Rock would like to bring against the International. *See NLRB v. Drivers Local Union No. 639*, 362 U.S. 274, 289-290 (1960) (quoting *Local 1976, United Bhd. of Carpenters v. NLRB*, 357 U.S. 93, 99-100 (1958) (LMRA was "the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation," and that fact "counsels wariness" in interpreting the LMRA to achieve a certain result "when, from the words of the statute itself, it is clear that those interested in just such a [result] were unable to secure its embodiment in enacted law.")); *Lodge 76, Int'l Ass'n of Machinists v. Wisc. Employment Relations Comm'n*, 427 U.S. 132, 155 (1976) ("congressional intent in enacting the comprehensive federal law of labor relations" results in certain areas being "free of regulation").

4. Finally, Granite Rock attempts to persuade the Court that not permitting tortious interference claims to be brought under Section 301 provides unions with a "blueprint for industrial chaos." Pet. at 35.[8] The majority rule that the Ninth Circuit adopted, however,

---

[8] This claim is ironic since in most of the circuit court cases cited *supra* it was the employer that argued that Section 301 does *not* create a claim for tortious interference. *See, e.g., Covenant Coal Corp.*, 977 F.2d 895; *Pratt-Farnsworth*, 690 F.2d 489; *Commercial Prop. Servs.*, 755 F.2d 499; *Loss*, 673 F.2d 942; *Quality Plus Stores, Inc.*, 961 F.2d 904.

has been followed for well over 40 years with no indication that it has produced such chaos.[9]

Granite Rock's related intimation, that the Ninth Circuit's decision leaves it remediless, is also plainly false. Pet. at 32-33. It has precisely the remedy that Congress intended when it passed Section 301: a breach of contract claim against the labor organization that allegedly committed a "violation of contract[ ]," *viz.*, Local 287. In fact, Petitioner has vigorously pursued that remedy in this case and also filed an unfair labor practice charge against Local 287 with the National Labor Relations Board. *See Granite Rock Co. v. Int'l Bhd. of Teamsters Local 287*, 546 F.3d 1169 (9th Cir. 2008); *Teamsters Union Local 287 v. NLRB*, 293 Fed.Appx. 518 (9th Cir. 2008); *Teamsters Local 287*, 347 NLRB No. 32 (2006).

Thus, Granite Rock has remedies; just not the remedy it believes Congress should have provided. But as the Ninth Circuit correctly recognized, "[i]f Con-

---

[9] On the other hand, if Granite Rock's proposed reading of Section 301 were accepted, every plaintiff in a breach of contract action—be it a union or an employer—would have a strong incentive to bring a tort claim against some "deep pocket" parent entity by alleging, as Granite Rock did here, that the parent somehow induced the party to the CBA to breach its terms. Under current law, a parent company that instructs a wholly-owned subsidiary to breach its CBA can only be liable for the resulting breach if the subsidiary is an alter ego of the parent. *Cf. Sheet Metal Workers Int'l Ass'n, Local No. 359 v. Ariz. Mech. & Stainless, Inc.*, 863 F.2d 647, 651 (9th Cir. 1988). Under the interpretation of Section 301 put forth by Granite Rock, however, a union could bring a tort claim against the deep-pocket parent without having to establish an alter ego relationship. *Cf. Int'l Union, United Auto. Workers v. N. Telecom, Inc.*, 434 F.Supp. 331 (E.D. Mich. 1977) (tortious interference claim against parent company not cognizable under Section 301).

gress did not provide a remedy for Granite Rock directly against [the International]," in addition to its remedies against Local 287, "then that is an issue to be addressed by Congress, not by an extraordinary and outlier interpretation of the governing statute." Pet. App. 12-13.[10]

---

[10] Granite Rock also suggests that certiorari should be granted because of an alleged "Circuit division" regarding whether Section 301 preempts a state claim for tortious interference with a CBA. Pet. at 32-34. The preemptive effect of Section 301 was not before the Ninth Circuit and is not addressed in its decision, since Granite Rock never sought to bring a state law tortious interference claim against the International.

Amici National Association of Manufacturers (Br. at 9) and Associated General Contractors (Br. at 8-11) also cite Section 301 preemption cases and suggest that because state law claims requiring the interpretation of the terms of a CBA are preempted by Section 301 due to Congress' desire that there be uniformity in the interpretation of CBAs, a tortious interference claim must necessarily "arise under" Section 301 because an element of such a claim (*i.e.*, breach of contract) requires an interpretation of the terms of a CBA. That argument, however, confuses two very different issues. The first, involved in this case, is whether Congress intended Section 301 to create a federal claim only for breach of contract. The second issue, not involved in this case, is whether, if Congress created only a breach of contract claim in Section 301, it intended to occupy the field and preempt any state claim, such as tortious interference, that arises in the context of an alleged breach of a CBA.

CONCLUSION

For the foregoing reasons, the Court should deny Petitioner's request that certiorari be granted to review that portion of the Ninth Circuit's decision holding that Granite Rock could not bring a claim for tortious interference against the International pursuant to Section 301.

Respectfully submitted,

BRADLEY T. RAYMOND
INTERNATIONAL BROTHERHOOD OF TEAMSTERS
25 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 624-6945

STEPHEN P. BERZON
PETER D. NUSSBAUM *
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

* Counsel of Record

May 29, 2009

REPLY BRIEF

(1)

No. 08-1214

FILED
JUN 8 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court of The United States

GRANITE ROCK COMPANY,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS & TEAMSTERS LOCAL 287,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ARTHUR R. MILLER
Of Counsel
NEW YORK UNIVERSITY
SCHOOL OF LAW
40 Washington Square South
Vanderbilt Hall 409D
New York, NY 10012
Telephone: 212.992.8147

GARRY G. MATHIASON
Counsel of Record
ALAN S. LEVINS
ADAM J. PETERS
RACHELLE L. WILLS
LITTLER MENDELSON
650 California Street
20th Floor
San Francisco, CA 94108
Telephone: 415.433.1940

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

I. A CLEAR CIRCUIT SPLIT EXISTS REGARDING FEDERAL COURTS' JURISDICTION TO DETERMINE IF A CONTRACT WAS FORMED EVEN IF NO PARTY SEPARATELY CHALLENGES THE VALIDITY OF THE ARBITRATION PROVISION 1

A. The Third And Ninth Circuits Have Reached Directly Opposite Conclusions About Courts' Jurisdiction To Determine Disputes Over Contract Formation When The Proposed Contract Includes An Unchallenged Arbitration Provision 2

B. Granite Rock Did Not Explicitly Or Implicitly Consent To Arbitrate The Formation Of The Contract By Alleging Its Validity 4

C. The Ninth Circuit's Decision Will Have A Vast Impact As It Applies To All Labor And Commercial Contracts With An Arbitration Provision 6

TABLE OF CONTENTS
(CONTINUED)

PAGE

II. A CLEAR CIRCUIT SPLIT EXISTS AS TO WHETHER SECTION 301(A) PROVIDES A CAUSE OF ACTION AGAINST A NON-SIGNATORY THAT INDUCES A BREACH OF A LABOR CONTRACT FOR ITS OWN GAIN 8

A. IBT Admits A Circuit Split Exists Concerning The Scope Of Section 301(a) While Ignoring Other Fundamental Differences Between The Circuits 8

B. The Ninth Circuit Decision Is A Blueprint For Industrial Chaos. 10

CONCLUSION 12

TABLE OF AUTHORITIES

PAGE

Cases

14 Penn Plaza LLC v. Pyett, 556 U.S. ___,
129 S.Ct. 1456,
173 L.Ed.2d 398 (April 1, 2009) 5, 7

Adam v. Suozzi,
433 F.3d 220 (2d Cir. 2005) 5

Am. Fed. of TV & Radio Artists v. WJBK-TV,
164 F.3d 1004 (6th Cir. 1999) 10

AT&T Tech. v. Comm. Workers,
475 U.S. 643 (1986) 1, 4

Boys Markets, Inc. v. Retail Clerks Union, Local 70,
398 U.S. 235 (1970) 4

Buckeye Check Cashing, Inc. v. Cardegna,
546 U.S. 440 (2006) 1, 2, 3, 5, 7

Chastain v. Robinson-Humphrey Co.,
957 F.2d 851 (11th Cir. 1992) 3

Dougherty v. Parsec, Inc.
872 F.2d 766 (6th Cir. 1989) 9

Fox Int'l Relations v. Fiserv Securities, Inc.,
418 F.Supp.2d 718 (E.D. Penn. 2006) 3

TABLE OF AUTHORITIES
(CONTINUED)

PAGE

Granite Rock Co. v. Int'l Brotherhood of Teamsters, Freight Construction, General Drivers, Warehousemen & Helpers, Local 287 (AFL-CIO), et al., 546 F.3d 1169 (9th Cir. 2008) 6

Griffin v. Gutter Grate of Troy Birmingham LLC, 546 F.Supp.2d 469 (E.D. Mich. 2008) 3

Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002) 5

Johnson v. Jones, 515 U.S. 304 (1995) 12

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 3

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) 1

Rowe Enterprises LLC v. Int'l Systems & Electronics Corp., 932 So.2d 537 (Fla. Ct. of Apps. 2006) 3

Sandvik AB v. Advent Int'l Corp., 220 F.3d 99 (3d Cir. 2000) 2, 3, 7

Sphere Drake Ins. Ltd v. All Am. Ins. Co., 256 F.3d 587 (7th Cir. 1995) 3

Teamsters Nat'l Auto Transportation Indus. Negotiating Comm v. Troha, 328 F.3d 325 (7th Cir. 2003) 9

TABLE OF AUTHORITIES
(CONTINUED)

PAGE

Textile Workers of Am. v. Lincoln Mills,
353 U.S. 448 (1957) 11

Thompson v. Lithia Chrysler Jeep Dodge of Great Falls, A.B.N.,
343 Mont. 392, 185 P.3d 332 (2008) 3

Toledano v. O'Connor,
501 F.Supp.2d 127 (D.D.C. 2007) 3

Tracer Research Corp. v. Nat'l Environmental Services Co.,
42 F.3d 1292 (9th Cir. 1994) 5

United Association of Journeymen and Apprentices v. Georgia Power Co.,
684 F.2d 721 (11th Cir. 1982) 9

United Food & Commercial Workers Union, Local No. 1564 v. Quality Plus Stores Inc.,
961 F.2d 904 (10th Cir. 1992) 10

Whelan v. Colgan,
602 F.2d 1060 (2d Cir. 1979) 10

Wilkes-Barre Publishing Co. v. Newspaper Guild of Wilkes-Barre, Local 120,
647 F.2d 372 (3d Cir. 1981) 8

Will-Drill Res., Inc. v. Samson Res. Co.,
352 F.3d 211 (5th Cir. 2003) 5

TABLE OF AUTHORITIES
(CONTINUED)

PAGE

Wiwa v. Royal Dutch Petroleum Co.,
226 F.3d 88 (3d Cir. 2000) 11

Xaros v. U.S. Fidelity & Guarantee Co.,
820 F.2d 1176 (11th Cir. 1987) 9

Statutes

Alien Tort Claims Act, 28 U.S.C. § 1350 11

Labor-Management Relations Act,
29 U.S.C. § 185(a) ..... *passim*

Convention On The Recognition and Enforcement of
Foreign Arbitral Awards (CREFAA)
9 U.S.C. § 201, *et seq.* 2

PETITIONER'S REPLY BRIEF

STATEMENT

Petitioner Granite Rock Company respectfully submits this Reply Brief in support of its petition for a writ of certiorari. Respondents' briefs in opposition highlight the entrenched Circuit division over two interrelated issues of national importance: first, whether an arbitrator may preempt the courts in determining the threshold question of whether a labor or commercial contract has been formed; and second, whether a federal cause of action exists against a non-signatory that induces the breach of a collective bargaining agreement for its own gain.

I. A CLEAR CIRCUIT SPLIT EXISTS REGARDING FEDERAL COURTS' JURISDICTION TO DETERMINE IF A CONTRACT WAS FORMED EVEN IF NO PARTY SEPARATELY CHALLENGES THE VALIDITY OF THE ARBITRATION PROVISION.

As discussed at length in the petition, two lines of jurisprudence exist regarding courts' jurisdiction over issues of arbitrability. (Pet. 10-11). *AT&T Tech. v. Comm. Workers*, 475 U.S. 643, 649, (1986) (absent clear, unmistakable contractual language stating otherwise, the court must decide whether the parties agreed to arbitrate the dispute); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (absent a separate challenge to the validity of the arbitration clause when a party raises contractual defenses, such as

fraud, the arbitrator should decide the merits). In *Buckeye*, 546 U.S. at 444 n.1, the Court expressly declined to apply its holding to the issue raised here – courts' jurisdiction to decide issues of contract formation.

Lacking clarification, Circuits have attempted to reconcile the aforementioned lines of jurisprudence, resulting in a clear, mature Circuit split. With this case, the split has widened such that in the Ninth Circuit courts must refer any contract formation disputes to arbitration if the proposed contract includes an unchallenged arbitration provision.

A. The Third And Ninth Circuits Have Reached Directly Opposite Conclusions About Courts' Jurisdiction To Determine Disputes Over Contract Formation When The Proposed Contract Includes An Unchallenged Arbitration Provision.

Local 287 admits that the Ninth Circuit's decision squarely conflicts with the Third Circuit's decision in *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (3d Cir. 2000). Local 287's strained attempts to distinguish *Sandvik* from the Ninth Circuit's decision only serve to demonstrate the seriousness of the conflict.

Local 287 attempts to distinguish *Sandvik* because the contract in that case was covered by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (CREFAA) 9 U.S.C. § 201, *et seq.* This is a distinction without a difference.

Sandvik rested its decision on the Federal Arbitration Act (FAA), in which the CREFAA is incorporated, and made clear it interpreted an arbitration agreement covered by the FAA. *Sandvik,* 220 F.3d at 100-01; *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985).

Likewise, Local 287's argument that *Buckeye* limited *Sandvik* fails. (Local 287 Opp. 8). *Buckeye* cited *Sandvik* and expressly declined to address the precise issue presented, i.e., does the court decide the threshold issue of whether a contract containing an arbitration provision was formed. 546 U.S. at 444 n.1. Since *Buckeye*, courts continue to apply *Sandvik's* logic when considering arbitrability of contract formation disputes. *See Toledano v. O'Connor*, 501 F.Supp.2d 127, 140 (D.D.C. 2007); *Griffin v. Gutter Grate of Troy Birmingham LLC*, 546 F.Supp.2d 469, 471 n.2 (E.D. Mich. 2008); *Fox Int'l Relations v. Fiserv Securities, Inc.*, 418 F.Supp.2d 718, 723-24 (E.D. Penn. 2006); *Thompson v. Lithia Chrysler Jeep Dodge of Great Falls, A.B.N.*, 343 Mont. 392, 399, 185 P.3d 332, 337 (2008); *Rowe Enterprises LLC v. Int'l Systems & Electronics Corp.*, 932 So.2d 537, 541 (Fla. Ct. of Apps. 2006).

Local 287 also fails to distinguish effectively other Circuit decisions that hold courts must resolve disputes over whether a contract was formed. *Sphere Drake Ins. Ltd v. All Am. Ins. Co.*, 256 F.3d 587, 591 (7th Cir. 1995) ("[A]s arbitration depends on a valid contract, an argument that the contract does not exist can't logically be resolved by the arbitrator."); *Chastain v. Robinson-Humphrey* Co., 957 F.2d 851, 856 (11th Cir. 1992) (when the

existence of a contract is disputed, the court should decide whether a ratified contract exists). These Circuit decisions also directly conflict with the Ninth Circuit.

B. Granite Rock Did Not Explicitly Or Implicitly Consent To Arbitrate The Formation Of The Contract By Alleging Its Validity.

Local 287 asserts Granite Rock assented to arbitration because it filed a lawsuit alleging Local 287 breached the collective bargaining agreement. (the "CBA"). (Local 287 Opp. 4). Granite Rock, however, never conceded that an arbitrator under the CBA would have authority to decide whether the CBA was formed.[1] Granite Rock maintained that the court must first decide whether the CBA existed. Only if the court found a valid, binding CBA, could there be an arbitration.

In *AT&T Tech.*, 475 U.S. at 649, this Court made clear courts have jurisdiction to determine

---

[1] Local 287 mischaracterizes Granite Rock's complaint. To enjoin a strike that violates a labor contract, the party seeking the injunction must establish that a labor contract exists, and that the strike is over an issue that should be resolved by arbitration. *Boys Markets, Inc. v. Retail Clerks Union, Local 70*, 398 U.S. 235, 254 (1970). Defending against Granite Rock's efforts to obtain injunctive relief, Local 287 alleged that the CBA did not exist. Granite Rock never claimed the arbitrable issue was whether the contract was formed. Granite Rock alleged that a valid CBA existed and that the strike was unlawful because it was over an issue that the arbitrator must resolve. The arbitrable issue was the only issue Granite Rock agreed to arbitrate as it must to seek an injunction against the strike.

whether parties consented to arbitrate their dispute. *See also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (contract formation issues may not be referred to arbitration unless parties "clearly and unmistakably" agree). More recently, in *14 Penn Plaza LLC v. Pyett*, 556 U.S. ___, 129 S.Ct. 1456, 173 L.Ed.2d 398 (April 1, 2009), the Court reaffirmed this principle, holding that courts must honor clear, unmistakable agreements to arbitrate statutory discrimination claims. Sl. Op. at 15. Contrary to Local 287's claim, *Buckeye* does not diminish courts' authority to make this threshold determination. *Buckeye* expressly declined to address whether contract formation disputes must be decided by the court or the arbitrator absent contractual language requiring arbitration of such disputes. 546 U.S. at 444 n.1.

The arbitration provision in this case contains no clear, unmistakable language that could be read to grant an arbitrator authority to decide contract formation issues. Like most, it obligates the parties to arbitrate disputes "arising under" the CBA. (Pet., A-176). That language assumes a contract exists. *A fortiori*, it is not clearly and unmistakably to the contrary.[2] *See Adam v. Suozzi*, 433 F.3d 220, 227-28 (2d Cir. 2005) (the court must first determine whether a binding labor contract existed before compelling arbitration); *Will-Drill Res., Inc. v.*

---

[2] The Ninth Circuit ignored its precedent in which it interpreted commonly used arbitration language, such as "arising under" and/or "arising out of" narrowly to exclude from arbitration disputes that do not require interpretation of provisions of an existing agreement. *Tracer Research Corp. v. Nat'l Environmental Services Co.*, 42 F.3d 1292, 1295 (9th Cir. 1994).

Samson Res. Co., 352 F.3d 211, 216-17 (5th Cir. 2003) (where a party attacks the very existence of an agreement, as opposed to its continued validity or enforcement, the courts must first resolve the dispute). The Circuit conflict thus requires this Court's review.

C. The Ninth Circuit's Decision Will Have A Vast Impact As It Applies To All Labor And Commercial Contracts With An Arbitration Provision.

Local 287 attempts to define this case as "narrow and unusual," by claiming Granite Rock "consented" to arbitrate the formation issue. (Local 287 Opp. 4). The Ninth Circuit similarly concluded "Granite Rock implicitly [consented] by suing under the contract containing the arbitration clause . . . . ." *Granite Rock Co. v. Int'l Brotherhood of Teamsters, Freight Construction, General Drivers, Warehousemen & Helpers, Local 287 (AFL-CIO), et al.*, 546 F.3d 1169, 1178 (9th Cir. 2008). This decision means that any party claiming a contract exists, "implicitly" agrees to arbitration merely by filing a lawsuit for enforcement. *Id.* Of course, to enforce a contract, one or both of the parties must, however, assert the validity of the underlying contract. The Ninth Circuit's holding runs contrary to every other Circuit, and means that no party to a labor or commercial contract may request a court to decide contract formation unless the party separately disavows the arbitration provision.

The Ninth Circuit's decision guarantees further division among the Circuits and impacts thousands of labor contracts and hundreds of

thousands of commercial contracts. The Ninth Circuit equates the act of claiming a valid contract exists with "clear and unequivocal" consent to arbitration. The Ninth Circuit thus expands arbitration further than *14 Penn Plaza*, 556 U.S. ___, 129 S.Ct. 1456, 173 L.Ed. 2d 398 (April 1, 2009), and *Buckeye*, 546 U.S. at 444 n.1, raising the important question of where is the jurisdictional line between courts and arbitrators on contract formation disputes. The Ninth Circuit answers this question by overturning a unanimous jury decision that a binding CBA had been formed.

The issue presented here necessarily threatens stability of labor and commercial relationships. A party, who seeks to enforce a non-existent contract with an arbitration provision, may now compel the other party, who never agreed to the putative contract, to arbitrate disputes about whether a binding contract exists. In the labor context, the Ninth Circuit's decision provides a profound disincentive to enter into tentative agreements during negotiations because an employer or union may be obligated to arbitrate disputes even though no valid, binding agreement exists.

The Ninth Circuit's decision leads to illogical results. By referring contract formation questions to arbitration, the Ninth Circuit authorizes arbitrators to determine their own jurisdiction. *See Sandvik*, 220 F.3d at 111 (by referring contract formation questions to arbitrators, courts would permit "arbitrators to determine their own jurisdiction, something that is not permitted in the federal jurisprudence of arbitration"). If the arbitrator

concludes that no contract was formed, the arbitrator effectively determines he or she had no jurisdiction to make that determination. The illogical effect of this decision clearly merits review by this Court.

II. A CLEAR CIRCUIT SPLIT EXISTS AS TO WHETHER SECTION 301(A) PROVIDES A CAUSE OF ACTION AGAINST A NON-SIGNATORY THAT INDUCES A BREACH OF A LABOR CONTRACT FOR ITS OWN GAIN.

Each Circuit approaches Section 301(a) jurisdiction analysis over non-signatories differently. (Pet. 21-36). Again, a clear difference exists between the Third and Ninth Circuits, which clash over whether Congress intended to regulate the conduct of non-signatory international unions that induce breaches of a CBA by causing a devastating strike. In light of the division between the Third and Ninth Circuits, and the multiple variations among other Circuits on an issue important to uniform national labor policy, this Court's review is necessary.

A. IBT Admits A Circuit Split Exists Concerning The Scope Of Section 301(a) While Ignoring Other Fundamental Differences Between The Circuits.

IBT admits the Ninth Circuit irreconcilably split from the Third Circuit on federal courts' jurisdiction over causes of action against non-signatories under Section 301(a). *See Wilkes-Barre Publishing Co. v. Newspaper Guild of Wilkes-Barre,*

Local 120, 647 F.2d 372, 381 (3d Cir. 1981).[3] Although this conflict alone justifies this Court's clarification, the IBT mistakenly asserts that virtually all other Circuits interpret Section 301(a) similar to the Ninth Circuit's interpretation.[4] IBT's argument minimizes the conflict between the Third and Ninth Circuits and is contradicted by other Circuits' authority.

---

[3] IBT essentially ignores that a conflict exists between the Ninth and Eleventh Circuits. In *United Association of Journeymen and Apprentices v. Georgia Power Co.*, 684 F.2d 721 (11th Cir. 1982), the Eleventh Circuit recognized a claim for "tortious interference with a [CBA]." Five years later, the Eleventh Circuit held, with no reference to *Georgia Power*, Section 301(a) provides jurisdiction "only against those who are parties to the contract in issue." *Xaros v. U.S. Fidelity & Guarantee Co.*, 820 F.2d 1176, 1181 (11th Cir. 1987) (emph. in orig.) Since neither *Georgia Power* nor its rationale was overruled, the Eleventh Circuit may still recognize a cause of action to reach the extreme misconduct alleged here.

[4] IBT also wrongly labels this case as a choice whether Section 301(a) recognizes only causes of action based on contract law or whether it includes a "tort." (IBT Opp. 3-4). The above dichotomy distorts Congress's intent that courts create federal common law to carry out the purpose of Section 301(a) to minimize work stoppages during the term of labor contracts. Section 301(a) jurisdiction "reaches not only suits on labor contracts, but also suits seeking remedies for violations of such contracts." *Wilkes-Barre*, 647 F.2d at 380. *See also Teamsters Nat'l Auto Transportation Indus. Negotiating Comm. v. Troha*, 328 F.3d 325, 330 (7th Cir. 2003) ("When the purpose of the lawsuit effectuates the goals of § 301(a), then it is appropriate for federal common law to embrace such suits."); *Dougherty v. Parsec, Inc.*, 872 F.2d 766, 771 (6th Cir. 1989) (applying under Section 301(a), Ohio tort claims law of contractual interference). The label of "tort" or "contract" should not interfere with courts' ability to carry out Section 301(a)'s intent.

The petition sets forth a comprehensive analysis of various Circuits, demonstrating fundamental differences over Section 301(a) jurisdiction, federal common law, and remedies. (Pet. 25-34). Similar to the Ninth Circuit, some Circuits now refuse to exercise any jurisdiction over non-signatories. *See United Food & Commercial Workers Union, Local No. 1564 v. Quality Plus Stores, Inc.*, 961 F.2d 904, 906 (10th Cir. 1992). Other Circuits allow jurisdiction for specific purposes, such as subpoena power. *See Am. Fed. of TV & Radio Artists v. WJBK-TV*, 164 F.3d 1004, 1009-10 (6th Cir. 1999). Still others apply fact-intensive inquiries about what rights or duties a labor contract may give to non-signatories. *See Whelan v. Colgan*, 602 F.2d 1060, 1061-62 (2d Cir. 1979).[5] The aforementioned cases make clear that questions concerning Section 301(a)'s applicability to non-signatories are far from resolved.

B. The Ninth Circuit Decision Is A Blueprint For Industrial Chaos.

IBT refers to, but fails to grapple with Granite Rock's and *Amicis'* position that the Ninth Circuit decision is a formula for significant industrial strife. As discussed in the petition and acknowledged by IBT, the Ninth Circuit's decision effectively permits international unions to act with impunity to induce violations of labor contracts, without concern that an employer would pursue any remedy for the

---

[5] Even if this Court were to side with Circuits that limit Section 301(a) jurisdiction over non-signatories to those with rights and duties under the CBA, this case qualifies since the breach was engineered for the explicit purpose of acquiring a right to indemnity under the CBA.

international's wrongdoing. (Pet. 34-35). Obviously, such a result undermines Section 301's intent to promote enforcement of contracts and preserve labor peace. *See Textile Workers of Am. v. Lincoln Mills*, 353 U.S. 448, 453 (1957).

IBT's suggestion that this massive loophole in Section 301(a) was a calculated, intended decision by Congress is belied by the objective and plain language of Section 301(a). Congress's intent under Section 301(a) was to rein in irresponsible unions that found ways to avoid the no-strike provisions in their labor contracts. Likewise, IBT's suggestion that its actions were "uncharacteristic" of labor union strategy ignores the reality of the prospective effect the Ninth Circuit's decision. Often new legal strategies evolve from decades old statutes. *See, e.g., Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 103-04 (3d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001) (recounting the history of the Alien Tort Claims Act, 28 U.S.C. § 1350, originally adopted in 1789, which "[f]or almost two centuries, lay relatively dormant" as a basis for federal jurisdiction until 1980). As organized labor attempts to expand its political and economic role, the Ninth Circuit created the foundation for a new form of "legal" access to use of economic force during the term of CBAs with mutually agreed upon no-strike clauses. Internationals may sacrifice under-funded locals to apply pressure for concessions such as the immunity agreement sought from Granite Rock.

Finally, IBT mischaracterizes the facts. (IBT Opp. 10, n. 9). This case involves much more than the presence of closely aligned entities. It involves an International that inserted itself into negotiations

for a CBA, required its proxy, Local 287, to insist on language that would benefit the International and then caused the Local to breach the CBA's no-strike provision when the employer refused to agree to the International's demand.[6] IBT fomented and participated in this unlawful strike and should be held responsible for its actions, regardless of whether it was legally an alter-ego of the local.

CONCLUSION

Granite Rock respectfully requests this Court grant review of both of the Ninth Circuit's holdings as they are in conflict with the decisions of other Circuits, threaten the uniformity of national arbitration policy, and violate public policy by granting immunity for the act of causing the breach of a labor contract.

---

[6] In its opposition, IBT attributes the continuation of the strike to its local. IBT's facts are flawed as the Complaint attributes the continuation of the strike to IBT. *See Johnson v. Jones*, 515 U.S. 304, 313 (1995) (in the event of a dismissal, all allegations in the complaint must be presumed true and viewed in the light most favorable to the defendant).

Respectfully Submitted,

Garry G. Mathiason
Counsel of Record
Alan S. Levins
Adam J. Peters
Rachelle L. Wills
LITTLER MENDELSON
A Professional Corporation
650 California Street, 20th Floor
San Francisco, CA 94108.2693
Telephone: 415.433.1940

Arthur R. Miller
Of Counsel
New York University School of Law
40 Washington Square South
Vanderbilt Hall 409D
New York, NY 10012
Telephone: 212.992.8147

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
MAY 1 - 2009
OFFICE OF THE CLERK

No. 08-1214

In the Supreme Court of the United States

GRANITE ROCK COMPANY,
Petitioner,
v.
INTERNATIONAL BROTHERHOOD OF TEAMSTERS & TEAMSTERS LOCAL 287,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS BRIEF OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. IN SUPPORT OF PETITIONER

Michael E. Kennedy
General Counsel
The Associated General Contractors of America, Inc.
2300 Wilson Boulevard, Suite 400
Arlington, VA 22201
703-837-5335

WILLIAM BEVAN III
DAVID J. BIRD*
REED SMITH LLP
435 Sixth Avenue
Pittsburgh, PA 15219
412-288-3131

Counsel for Amicus Curiae The Associated General Contractors of America, Inc.
**Counsel of Record*

May 1, 2009

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. The Second Question Presented In The Petition Describes A Conflict Concerning The Scope Of § 301(a) Of The Labor Management Relations Act That Is Well-Developed And In Need Of Resolution By This Court. 6

A. The Text Of § 301(a) And This Court's Precedents Mandate Federal Jurisdiction Over All "Suits For Violation Of Contracts Between An Employer And A Labor Organization." 6

B. The Third Circuit Has Held That § 301(a) Provides Federal Courts With Jurisdiction Over Suits Such As This One By A Signatory To A Labor Agreement Against A Defendant Who Did Not Sign The Agreement Or Have Any Formal Obligation Under It, But Who Nevertheless Caused A Violation Of The Agreement.... 12

C. Other Circuits, Including The Ninth Circuit In This Case, Have Reached The Opposite Conclusion Based On A Narrow Reading Of § 301(a) That Is Not Well-Founded In This Court's Precedents..... 16

II. Resolution Of The Second Question Presented Is Critically Important To The Development Of A Uniform Body Of Federal Common Law Under § 301(a) That Adequately Deters And Remedies Violations Of Labor Agreements..... 21

CONCLUSION..... 25

TABLE OF AUTHORITIES

Cases

Allis-Chalmers Corp. v. Lueck,
471 U.S. 202 (1985) 7, 9, 10, 22

American Federation of Television and Radio Artists, AFL-CIO v. WJBK-TV (New World Communications of Detroit, Inc.),
164 F.3d 1004 (6th Cir. 1999) 20

Anderson v. Aset Corp.,
416 F.3d 170 (2d Cir. 2005) 23

Associated General Contractors of America v. Metropolitan Water Dist. of S. California,
159 F.3d 1178 (9th Cir. 1998) 4

Atkinson v. Sinclair Refining Co.,
370 U.S. 238 (1962) 8, 13, 23

Bartholomew v. AGL Resources, Inc.,
361 F.3d 1333 (11th Cir. 2004) 23

Bowers v. Ulpiano Casal, Inc.,
393 F.2d 421 (1st Cir. 1968) 16, 17

Brannan Sand & Gravel Co.,
289 NLRB 977 (1988) 3

Brown v. Pro Football, Inc.,
518 U.S. 231 (1996) 4

Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.,
507 U.S. 218 (1993) 4

Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.,
690 F.2d 489 (5th Cir. 1982) 16, 17

Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100,
421 U.S. 616 (1975) 3

Glens Falls Building & Construction Trades Council,
350 NLRB 417 (2007) 4

Granite Construction Co.,
330 NLRB 205 (1999) 4

Greenblatt v. Delta Plumbing & Heating Corp.,
68 F.3d 561 (2d Cir. 1995) 18, 20, 21

Int'l Union, United Mine Workers of America v. Covenant Coal Corp.,
977 F.2d 895 (4th Cir. 1992) 16, 17

John Deklewa & Sons,
282 NLRB 1375 (1987), *enforced sub nom., International Ass'n of Bridge, Structural and Ornamental Iron Workers Local 3 v. NLRB*,
843 F.2d 770 (3d Cir. 1988) 3

Local 472 of the United Ass'n of Journeymen and Apprentices of Plumbing and Pipefitting Industry of U.S. and Canada v. Georgia Power Co.,
684 F.2d 721 (11th Cir. 1982)..... 15

Loss v. Blankenship,
673 F.2d 942 (7th Cir. 1982)..... 16, 17, 20

Mattis v. Massman,
355 F.3d 902 (6th Cir. 2004)..... 23

Mesa Verde Constr. Co. v. Northern California Dist. Council of Laborers,
861 F.2d 1124 (9th Cir. 1988)..... 3

New York State Chapter, Inc., AGC v. New York State Thruway Authority,
666 N.E.2d 185 (N.Y. 1996)..... 4

NLRB v. Town & Country Elec., Inc.,
516 U.S. 85 (1995)..... 4

Oberkramer v. IBEW-NECA Service Center, Inc.,
151 F.3d 752 (8th Cir. 1998)..... 23

Painting and Decorating Contractors Ass'n v. Painters and Decorators Joint Comm., Inc.,
707 F.2d 1067 (9th Cir. 1983)..... 19

Serv., Hosp., Nursing Home & Public Employees Union, Local No. 47 v. Commercial Prop. Servs., Inc., 755 F.2d 499 (6th Cir. 1985) 16, 17, 21

Smith v. Evening News Assn., 371 U.S. 195 (1962) ..... passim

Sprewell v. Golden State Warriors, 266 F.3d 979 (9th Cir. 2001) 23

Steinbach v. Dillon Companies, Inc., 253 F.3d 538 (10th Cir. 2001) 23

Steiny & Co., Inc., 308 NLRB 1323 (1992) 3

Teamsters Nat. Automotive Transporters Industry Negotiating Committee v. Troha, 328 F.3d 325 (7th Cir. 2003) 20

Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) 7, 10, 14, 15

Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448 (1957) 7, 22, 23, 24

Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Automobile, Aerospace, Agricultural Implement Workers of America, Intern. Union, 523 U.S. 653 (1998) 11

United Food & Com. Workers Union, Local No. 1564 v. Quality Plus Stores, Inc., 961 F.2d 904 (10th Cir. 1992)..... 16, 17

Whelan v. Colgan, 602 F.2d 1060 (2d Cir. 1979) 18

Wilkes-Barre Pub. Co. v. Newspaper Guild of Wilkes-Barre, Local 120, 647 F.2d 372 (3d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982)... 12, 13, 15

Wooddell v. International Brotherhood of Electrical Workers, Local 71, 502 U.S. 93 (1991)..... 10

Xaros v. U.S. Fid. and Guar. Co., 820 F.2d 1176 (11th Cir. 1987)..... 15, 16, 17

Statutes

Labor Management Relations Act, § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) 24

Labor Management Relations Act, § 301(a), 29 U.S.C. § 185(a) .....passim

Labor Management Relations Act, § 303, 29 U.S.C. § 187 24

Supreme Court Rule 37.2 1

Supreme Court Rule 37.6 1

INTEREST OF *AMICUS CURIAE*[1]

The Associated General Contractors of America, Inc. ("AGC") is among the largest and oldest of the trade associations in the construction industry and by far the most diverse. It was founded in 1918 at the express request of President Woodrow Wilson, and today it has 95 chapters and more than 33,000 members across the country. Among its members are more than 7,500 general construction contractors, 12,500 specialty contractors, and 13,000 material suppliers and service providers. Its members undertake a great variety of construction projects, including commercial buildings, apartment buildings, condominiums, factories, warehouses, highways, bridges, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects and defense facilities. AGC members also install utilities and otherwise prepare sites for the construction of single-family homes. Most

---

[1] Pursuant to Rule 37.2, counsel for the amicus certifies that counsel of record for all parties received timely notice of the amicus's intention to file an amicus curiae brief in support of the Petitioner at least ten days prior to the due date for the amicus curiae brief. Letters reflecting the parties' consent to the filing of this amicus curiae brief are being lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for the amicus states that no counsel for a party authored this brief in whole or in part and that no person other than the amicus, its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

AGC members are closely held and remain small, but others are publicly traded and among the nation's largest corporations.

AGC spans the entire spectrum of labor-management relations in the construction industry. While many AGC members are open shop, others are union firms that—either individually or as members of multi-employer bargaining units—negotiate and work under collective bargaining agreements with local and international unions representing carpenters, laborers, ironworkers, cement masons, operating engineers, and other trades, including the teamsters.

Most of AGC's chapters and all of the union contractors among AGC's members have a direct and immediate interest in the nature and scope of the federal common law remedies available to them under § 301(a) of the Labor Management Relations Act ("LMRA").

The negotiation of a collective bargaining agreement often involves multiple parties, including parties (like the international union in this case) that have a significant interest in the agreement but that are not formal signatories to the agreement and that do not hold specific rights or obligations under the agreement. Likewise, the performance of a collective bargaining agreement often is shaped by both the signatories to the agreement and non-signatories who have an interest in the agreement and the power to cause a violation of the terms of the agreement.

Like *all* union contractors, AGC members who negotiate and work under labor agreements rely upon them and have a strong interest in ensuring that both signatories and non-signatories are accountable for culpable conduct that causes a violation of signatories' contractual rights. AGC contends that § 301(a) provides federal courts with jurisdiction and authority to decide a claim against a non-signatory under the facts of this case, where the non-signatory is alleged to have: (1) actively participated in the negotiation of a collective bargaining agreement; (2) possessed the power to cause a violation of that agreement; (3) exercised that power and actually caused a violation of the agreement; and (4) acted in order to coerce a signatory into granting additional express rights that would benefit the non-signatory directly.

On many prior occasions, AGC has sought to help both the courts and the National Labor Relations Board shape the unique body of federal labor law relating to the construction industry. As an amicus curiae, AGC participated in *Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975); *John Deklewa & Sons*, 282 NLRB 1375 (1987), *enforced sub nom., International Ass'n of Bridge, Structural and Ornamental Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988); *Brannan Sand & Gravel Co.*, 289 NLRB 977 (1988); *Mesa Verde Constr. Co. v. Northern California Dist. Council of Laborers*, 861 F.2d 1124 (9th Cir. 1988); *Steiny & Co., Inc.*, 308 NLRB 1323 (1992); *Building & Constr. Trades Council v. Associated Builders & Contractors of*

Mass./R.I., Inc., 507 U.S. 218 (1993); *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85 (1995); *New York State Chapter, Inc., AGC v. New York State Thruway Authority*, 666 N.E.2d 185 (N.Y. 1996); *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996); *Associated General Contractors of America v. Metropolitan Water Dist. of S. California*, 159 F.3d 1178 (9th Cir. 1998); *Granite Construction Co.*, 330 NLRB 205 (1999), and *Glens Falls Building & Construction Trades Council*, 350 NLRB 417 (2007). As in the aforementioned cases, AGC is in a unique position to assist this Court with its consideration of the pending Petition.

SUMMARY OF ARGUMENT

The second question that the Petition presents to this Court is more than sufficient to justify a grant of certiorari. That question is a recurring one critically important to the development of a uniform body of federal common law under § 301(a) of the LMRA. The courts of appeals are irreconcilably divided over the scope of § 301(a) and the federal common law that § 301(a) calls upon the federal courts to develop.

In keeping with this Court's precedents broadly construing § 301(a) as a congressional mandate to fashion a body of federal common law to deter and redress violations of labor agreements, the Third Circuit has held that a signatory to a labor agreement may bring a claim under § 301(a) against a defendant who did not sign the agreement or assume any rights or obligations under it, but who nevertheless

caused a violation of the agreement. Other circuits, however, have held that federal common law remedies under § 301(a) are much narrower in scope and have held that federal common law remedies under § 301(a) are limited to suits against a defendant who either was a formal signatory to a labor agreement or assumed specific rights or obligations expressly created by a labor agreement.

Because this conflict is well-developed, produces inconsistent results in similar cases, and engenders considerable confusion and uncertainty in labor-management relations, the Court should grant certiorari and resolve the conflict. If the Court does not grant certiorari with respect to the second question and reverse the ruling below, it is likely that employers and unions will face increased interference in labor agreements in the future.

ARGUMENT[2]

I. The Second Question Presented In The Petition Describes A Conflict Concerning The Scope Of § 301(a) Of The Labor Management Relations Act That Is Well-Developed And In Need Of Resolution By This Court.

The second question presented by the Petition is an important one that directly implicates this Court's precedents construing § 301(a) of the LMRA and reveals a well-developed conflict among the courts of appeals. This Court's review and resolution of that conflict is needed to ensure that the statute and the Court's precedents are followed uniformly and correctly.

A. The Text Of § 301(a) And This Court's Precedents Mandate Federal Jurisdiction Over All "Suits For Violation Of Contracts Between An Employer And A Labor Organization."

Section 301(a) of the LMRA provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry

---

[2] AGC agrees with and relies upon the Statement of the Case set forth in the Petition.

> affecting commerce . . . or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a). By its terms, § 301(a) provides federal courts with subject-matter jurisdiction over *all* "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce." *Id.*

This Court's precedents make it clear, however, that § 301(a) also does much more than simply provide for federal subject matter jurisdiction. In *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1957), the Court found that § 301(a) also directs the federal courts to "fashion" a body of federal common law to address and remedy disputes arising out of labor contracts. *Id.* at 456; *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985) (citing *Lincoln Mills*).

Building on *Lincoln Mills*, in *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962), this Court held that a labor agreement between an employer and a union *must* be construed and enforced according to principles of federal common law developed under § 301(a), not state rules of decision. Accordingly, the Court concluded § 301(a) preempts any state law that would purport to govern the construction and

enforcement of agreements between an employer and a labor union. *Id.* at 103-04.

That same year, in *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 247 (1962), the Court reviewed an action that an employer had brought against members of a union with which the employer had a collective bargaining agreement, asserting a state law claim of tortious interference with that employer's contractual relationship with the union. The Court held that the state law tortious interference claim was preempted by § 301(a) and had to be dismissed. *Id.* Without dwelling on whether individual defendants were signatories to the labor agreement at issue, *Atkinson* held that the plaintiff's claim of tortious interference against them was one governed "by the national labor relations law which Congress commanded this Court to fashion under § 301(a)." 370 U.S. at 247.

Six months later, in *Smith v. Evening News Assn.*, 371 U.S. 195, 200-01 (1962), the Court held that an individual union member could bring an action against his employer under § 301(a) for breach of a collective bargaining agreement, even though the individual was not a signatory to the agreement at issue. In reaching this conclusion, the Court rejected a narrow construction of § 301(a) that would have limited the statute's grant of federal jurisdiction and federal common law remedies to only those suits "between" the employer and the labor union that had signed the agreement at issue. *Id.* The Court reasoned that the term "between" in § 301(a) refers only to "contracts," not "suits." According

to the Court, neither the "language" nor the "structure," nor the "legislative" history of § 301(a) supported a restrictive reading of the statute based on a litigant's status as a signatory to the agreement at issue. *Id.* Indeed, such a restrictive reading would "frustrate rather than serve the congressional policy expressed in that section." *Id.*

This Court's more recent decisions have continued to read § 301(a) to provide federal courts with a broad grant of jurisdiction to decide "suits" predicated upon an alleged violation of a labor agreement. For example, in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209-13, 220-21 (1985), the Court found that § 301(a) preempted a state law tort action that an employee had brought against his employer and the third-party administrator of an insurance plan included in a collective bargaining agreement. The employee alleged the employer and the administrator had acted in bad faith when handling his insurance claim. Although the employee's action sounded in tort under state law and it was asserted against a third-party administrator (not a signatory to the collective bargaining agreement between the employer and the employee's union), the Court had no difficulty concluding that the employee's state law claim must be treated *either* as a § 301(a) claim *or* dismissed altogether as preempted by federal labor law under § 301(a). *Id.* at 220-21.

In the words of the Court, "[i]f the policies that animate § 301 are to be given their proper range, ... the pre-emptive effect of § 301 must

extend beyond suits alleging contract violations.... Any other result would elevate form over substance and allow parties to evade the requirements of § 301." *Id.* at 210-11 (noting that the employee's claim had to be dismissed, even if treated as a claim under § 301(a), because the employee had failed to follow requisite grievance procedures).

"[W]hen resolution of a state-law [tort] claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim ... or dismissed as pre-empted by federal labor-contract law." *Id.* at 220. "The requirements of § 301 as understood in *Lucas Flour* cannot vary with the name appended to a particular cause of action." *Id.* "Unless federal law governs that [tort] claim, the meaning of the health and disability-benefit provisions of the labor agreement would be subject to varying interpretations, and the congressional goal of a unified federal body of labor-contract law would be subverted." *Id. See also Wooddell v. International Brotherhood of Electrical Workers, Local 71*, 502 U.S. 93, 99-100 (1991) (extending *Smith v. Evening News Assn.* to an action that a union member brought against his local union and its officers, alleging violations of the union constitution, notwithstanding that neither the plaintiff nor the named officer defendants were signatories to the constitution); *Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Automobile, Aerospace, Agricultural Implement Workers of America, Intern. Union*, 523 U.S.

653, 657-58 (1998) (§ 301(a) provides a "gateway" to federal court for any action filed "*because a contract has been violated*," and does not restrict the legal landscape the parties may traverse once in federal court) (emphasis in original).

Read individually and together, this Court's precedents underscore that § 301(a): (1) must be construed broadly to effectuate congressionally mandated labor policies; (2) provides federal courts with unique authority and responsibility to develop a federal common law concerning violations of labor agreements; (3) preempts state laws and causes of action that would govern the construction and enforcement of such agreements, including tortious interference claims that would require the construction of a labor agreement; and (4) provides a federal forum and remedies for all suits charging a violation of a labor agreement, without regard to the status of the litigants as signatories to the agreement at issue, and without regard to the characterization of the claim as "contract" or "tort."

B. The Third Circuit Has Held That § 301(a) Provides Federal Courts With Jurisdiction Over Suits Such As This One By A Signatory To A Labor Agreement Against A Defendant Who Did Not Sign The Agreement Or Have Any Formal Obligation Under It, But Who Nevertheless Caused A Violation Of The Agreement.

In keeping with the plain meaning of § 301(a), this Court's precedents, and the well-settled policies embedded in the statute, the Third Circuit has held that § 301(a) extends to lawsuits, like this one, that a signatory to a labor agreement brings against a non-signatory who is alleged to be culpable for a violation of the terms of the agreement. *See Wilkes-Barre Pub. Co. v. Newspaper Guild of Wilkes-Barre, Local 120*, 647 F.2d 372, 377, 379-81 (3d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

In *Wilkes-Barre*, a newspaper publisher brought an action against a local union, an international union, individual union members, and a competitor-publication created by the collective bargaining representatives of its employees. The publisher asserted: (1) a claim against the local union for breach of its collective bargaining agreement with the publisher; and (2) a claim against the international union and the remaining defendants for causing the local union to violate the agreement. In relevant part, the Third Circuit held that the publisher had

stated a valid claim under § 301(a) against the international union and the competitor publication for violation of a labor agreement, notwithstanding that the international union and the competitor publication had not signed the agreement. *Id.*[3]

The Third Circuit began its analysis of the issue by referring, first, to the text of § 301(a) and, second, to this Court's decision in *Atkinson v. Sinclair Refining Co.* *Id.* The court noted that, in *Atkinson*, the Court had ruled that a state law tortious interference claim was preempted by § 301(a) and governed completely "by the national labor relations law which Congress commanded this Court to fashion under § 301(a)." *Id.* at 377 (quoting *Atkinson*, 370 U.S. at 247).

With "those general principles in mind," the court turned to two prior Third Circuit decisions, as well as this Court's decision in *Smith v. Evening News Assn.*, 371 U.S. at 200-01. *See* 647 F.2d at 377-81. Following the broad construction given to § 301(a) in *Atkinson*, *Smith*, and numerous other cases, the Third Circuit held that § 301(a) provides federal subject matter jurisdiction over any suit that seeks remedies for

---

[3] The court affirmed the district court order dismissing the publisher's claims against individual union members, holding that these individual defendants were entitled to statutory immunity from suit under the LMRA and other statutes. *Id.*

a violation of an agreement between an employer and a labor union. *Id.*

As the court explained in its opinion, *nothing* in either the statute or this Court's jurisprudence suggests that § 301(a) jurisdiction should be limited to those suits that sound in "contract" and are brought against a signatory or other formal party to a labor agreement. *Id.* (holding that jurisdiction under § 301(a) does not turn on the status of litigants as signatories to an agreement or on the "label" attached to a cause of action). Rather, the "issue" is "whether the remedy sought may require the court ... interpret a collective bargaining agreement." *Id.* "All suits for violation of collective bargaining agreements are governed by federal law, because Congress intended that the scope of obligation in labor contracts in or affecting interstate commerce be uniform." *Id.* (citing *Lucas Flour*). "It is the need for national uniformity in determining the scope of obligation ... that determines whether a federal standard is applicable, and which determines, incidentally [whether there is] federal subject matter jurisdiction." *Id.*

Because a "violation" of the newspaper publisher's collective bargaining agreement would be an "essential element" of any action against the international union and other non-signatory defendants, the Third Circuit reasoned that the claim could not arise under state law and had to arise under federal common law developed pursuant to § 301(a). "A holding that tortious interference with a collective bargaining agreement is not a matter governed by federal

law would leave open the possibility of lack of uniformity in scope of obligation which the Court in *Lucas Flour* sought to prevent." *Id.*

Moreover, according to the Third Circuit, it was especially appropriate to hear claims for tortious interference with a collective bargaining agreement in federal court under § 301(a) because such claims involve the "protection of a property interest [in] a labor contract which has its being in and draws its vitality from the federal common law of labor contracts." *Id.* at 381.[4]

The defendants in *Wilkes-Barre* filed a petition for a writ of certiorari with this Court, and the Court denied the petition. 454 U.S. at 1143.

---

[4] In *Local 472 of United Ass'n of Journeymen and Apprentices of Plumbing and Pipefitting Industry of U.S. and Canada v. Georgia Power Co.*, 684 F.2d 721, 725 & n.1 (11th Cir. 1982), the Eleventh Circuit likewise concluded that § 301(a) authorizes courts to hear a claim for violation of a labor agreement brought against a defendant who did not sign the agreement at issue but who allegedly caused its breach. However, the Eleventh Circuit appears to have abrogated *Georgia Power* without explanation in *Xaros v. U.S. Fid. and Guar. Co.*, 820 F.2d 1176, 1181 (11th Cir. 1987), where the court held § 301(a) jurisdiction did not extend to claims against non-signatories to an agreement who allegedly caused a breach.

C. Other Circuits, Including The Ninth Circuit In This Case, Have Reached The Opposite Conclusion Based On A Narrow Reading Of § 301(a) That Is Not Well-Founded In This Court's Precedents.

Other courts of appeals, including the Ninth Circuit in this case, have ruled that § 301(a) does not provide a federal cause of action against a non-signatory who allegedly causes a violation of the terms of a labor agreement.[5] While these circuit courts have analyzed the issue in a number of different ways, two broad and distinct lines of authority have emerged.

The first line of authority is based on the premise that a suit brought against a non-signatory simply "cannot" be considered a suit "*for*" a "violation" of a labor agreement within the meaning of § 301(a). *Covenant Coal*, 977

---

[5] *See Int'l Union, United Mine Workers of America v. Covenant Coal Corp.*, 977 F.2d 895, 897 (4th Cir. 1992); *United Food & Com. Workers Union, Local No. 1564 v. Quality Plus Stores, Inc.*, 961 F.2d 904, 906 (10th Cir. 1992); *Xaros v. U.S. Fid. and Guar. Co.*, 820 F.2d 1176, 1181 (11th Cir. 1987); *Serv., Hosp., Nursing Home & Public Employees Union, Local No. 47 v. Commercial Prop. Servs., Inc.*, 755 F.2d 499, 506 (6th Cir. 1985)); *Loss v. Blankenship*, 673 F.2d 942, 948 (7th Cir. 1982); *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 501 (5th Cir. 1982); *Bowers v. Ulpiano Casal, Inc.*, 393 F.2d 421, 423 (1st Cir. 1968).

F.2d at 898 (emphasis added) ("It is axiomatic that only a party to a contract can violate that contract"). Under this line of authority, § 301(a) jurisdiction is inherently narrow and depends on whether (1) the plaintiff's claim can be characterized as one that sounds in "contract" under state law and (2) the litigants are formal parties to the agreement at issue.[6]

The second line of authority is slightly more nuanced. Cases decided under this line of authority recognize that a federal court may hear a suit against a non-signatory under § 301(a) under circumstances where the non-signatory is alleged to have breached a specific right or obligation *assumed by it* under the agreement at issue; however, they refuse to recognize a federal common law cause of action under § 301(a) against a non-signatory in the

---

[6] *See also Quality Plus Stores, Inc.*, 961 F.2d at 906 (action under § 301(a) dismissed because "[t]here is no collective bargaining agreement between the parties to the action"); *Xaros*, 820 F.2d at 1180-81 ("a Section 301 suit may be brought for violation of a labor contract only *against* those who are parties to the contract in issue") (emphasis in original); *Servs. Hosp.*, 755 F.2d at 506 (noting opinions applying a "much narrower" interpretation of § 301(a) jurisdiction); *Loss*, 673 F.2d at 946 (a § 301(a) action may only be brought against those who are parties to the contract at issue); *Pratt-Farnsworth*, 690 F.2d at 500-02 (same); *Bowers*, 393 F.2d at 423 (refusing to extend *Smith* to actions against non-signatories).

absence of express contractual terms directly benefiting or binding the non-signatory.

For example, in *Whelan v. Colgan*, 602 F.2d 1060, 1061-62 (2d Cir. 1979), the Second Circuit held that § 301(a) provided federal jurisdiction over a suit against individual trustees of a welfare fund created by a labor agreement. Section 301(a) provided federal jurisdiction and a federal common law remedy for the individual trustees' alleged misconduct, even though the individual trustees were not signatories to the agreement because the individual trustees allegedly breached a duty created by the labor agreement. *Id.* However, in *Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561, 572-73 (2d Cir. 1995), the same circuit ruled that the federal district court had no jurisdiction under § 301(a) to hear a claim brought by a plumbing industry board against the surety of an employer, in the aftermath of the employer's default on its obligations to make benefits payments under a collective bargaining agreement. According to *Greenblatt*, § 301(a) did not provide subject matter jurisdiction for the suit because the surety had "no duty arising under the collective bargaining agreement or any other labor contract," notwithstanding the fact that the surety's conduct vitiated a provision in the agreement providing for a bond in the event of the employer's default. *Id.* (distinguishing *Whelan*).

The case law in the Ninth Circuit concerning the scope of § 301(a) follows a similar pattern. In *Painting and Decorating Contractors Ass'n v. Painters and Decorators Joint Comm., Inc.*, 707

F.2d 1067, 1071 (9th Cir. 1983), the Ninth Circuit held that § 301(a) provided the federal district court with authority to decide a suit brought against a joint committee that a collective bargaining agreement had called for the parties to establish, notwithstanding that the joint committee was not a signatory to the agreement at issue. The court reasoned that jurisdiction was proper under § 301(a) because the agreement provided for the creation of the joint committee, gave the committee certain rights and obligations, and would have to be construed to litigate the dispute by the plaintiff against the committee. *Id.*

The Ninth Circuit, however, reached a different result in this case. Here, it held that Granite Rock Co., as an employer and the beneficiary of a no-strike clause included in a collective bargaining agreement, could not assert a claim under § 301(a) against the International Brotherhood of Teamsters ("IBT") for contractual damages that the IBT's action had allegedly caused. For the purpose of reviewing the district court's order dismissing Granite Rock's claims against the IBT, the Ninth Circuit accepted as true (1) that the IBT actively participated in the negotiation of the agreement at issue, (2) that, shortly after the ratification of that agreement, the IBT caused the local union and its members to violate a no-strike clause included in the

agreement,[7] (3) that the IBT took this action for the purpose of coercing Granite Rock to grant it express rights of indemnification in a side agreement, if not an amendment to the ratified agreement, and (4) that the IBT sought such rights for its own benefit, and not for the benefit of the local union that had ratified the agreement for the benefit of its members. However, the Ninth Circuit held such allegations were insufficient to state a claim against IBT under § 301(a). Much like the Second Circuit in *Greenblatt*, the Ninth Circuit ruled that § 301(a) did not provide a federal remedy against the IBT because the IBT had no express rights or duties under the ratified agreement. Pet. App. 5-12.[8]

---

[7] According to the Complaint, the resulting strike lasted more than two months and inflicted substantial financial damage on Granite Rock.

[8] In a similar fashion, courts have held that § 301(a) provides a federal remedy against non-signatories to enforce arbitration subpoenas but not against other non-signatories whose misconduct has caused a violation of contractual rights under an agreement. *Compare Teamsters Nat. Automotive Transporters Industry Negotiating Committee v. Troha*, 328 F.3d 325, 329 (7th Cir. 2003) (upholding an action under § 301(a) to enforce an arbitration subpoena) *and American Federation of Television and Radio Artists, AFL-CIO v. WJBK-TV (New World Communications of Detroit, Inc.)*, 164 F.3d 1004, 1007-09 (6th Cir. 1999) (same) *with Loss*, 673 F.2d at 948 (complaint of interference with a collective bargaining agreement is not actionable under § 301(a)) *and Serv.*,

Continued on following page

While cases like *Greenblatt* and this one acknowledge that federal jurisdiction and remedies under § 301(a) do not strictly depend on the formal status of a defendant as a signatory to an agreement, they continue to read § 301(a) in a narrow fashion and to find federal jurisdiction and federal common law remedies only for claims that "sound" in contract. Under these precedents, a party to a collective bargaining agreement simply cannot bring an action in federal court under § 301(a) against a defendant for causing the violation of an agreement, unless the defendant is a signatory of the agreement or is otherwise covered by a provision in the agreement expressly benefiting or binding the defendant.

II. Resolution Of The Second Question Presented Is Critically Important To The Development Of A Uniform Body Of Federal Common Law Under § 301(a) That Adequately Deters And Remedies Violations Of Labor Agreements.

Resolution of the conflict among the federal circuits is critically important to the development of a uniform body of federal common law under § 301(a). The aforementioned cases show that: (1) parties frequently litigate

---

Continued from previous page

Hosp., Nursing Home & Public Employees Union, Local No. 47, 755 F.2d at 506 (same).

the scope of federal jurisdiction and whether it authorizes federal remedies for claims against non-signatories to a labor agreement; (2) the courts of appeals currently are divided over the plain meaning of § 301(a) as well as this Court's precedents construing that statute; and (3) this conflict is producing inconsistent results and engendering considerable confusion and uncertainty in litigation regarding labor agreements. This conflict should not be allowed to continue. The nature and scope of the federal common law remedies available under § 301(a) should not vary depending on the circuit in which a dispute is litigated, but that is exactly what is happening now, and will continue to happen as long as the current circuit split remains unresolved.

This case provides the Court with an excellent opportunity to resolve the conflict over § 301(a) and ensure that § 301(a) and this Court's precedents are construed in a uniform manner consistent with Congress' mandate to "fashion" a body of federal common law to address and remedy disputes arising out of labor contracts. *Lincoln Mills*, 353 U.S. at 456; *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985) (citing *Lincoln Mills*).

The Court should grant certiorari with respect to the second question presented and reverse the judgment of the court of appeals to ensure that labor agreements are construed in a uniform manner based on substantive rules of federal common law and further ensure that federal common law provides an appropriate remedy for misconduct by culpable non-

signatories (like the international union here) who have participated in labor-management negotiations and then use their power over signatories to cause a violation of the resulting agreement to serve their own interests.

Indeed, if this Court does not grant certiorari with respect to the second question presented and reverse the court of appeals' ruling, that ruling is likely to leave employers and unions without a legal cause of action to deter or remedy interference with labor agreements by a non-signatory—a practical "no-man's land" in federal labor law—exactly what this Court's precedents clearly indicate should not occur. Following this Court's decisions in *Lincoln Mills* and *Atkinson*, the courts of appeals repeatedly have held that § 301(a) preempts the vast majority of state law claims for tortious interference with a labor agreement.[9] However, the narrow construction of § 301(a) adopted in this case means that employers and unions also will be precluded from bringing an action under § 301(a) to deter and redress such misconduct by

---

9 *See, e.g., Anderson v. Aset Corp.*, 416 F.3d 170 (2d Cir. 2005) (§ 301(a) preempted state law claim against nonsignatory defendant for tortious interference); *Bartholomew v. AGL Resources, Inc.*, 361 F.3d 1333 (11th Cir. 2004); *Mattis v. Massman*, 355 F.3d 902 (6th Cir. 2004) (same); *Sprewell v. Golden State Warriors*, 266 F.3d 979 (9th Cir. 2001) (same); *Steinbach v. Dillon Companies, Inc.*, 253 F.3d 538 (10th Cir. 2001) (same); *Oberkramer v. IBEW-NECA Service Center, Inc.*, 151 F.3d 752 (8th Cir. 1998) (same).

a non-signatory. The court of appeals' ruling, thus, creates a gap in federal labor law that will lead to an increase in interference by non-signatories in settled labor agreements. Although the Ninth Circuit suggested that it was Congress' job to fill in this "gap," Congress did that more than sixty years ago when it enacted § 301(a). In construing that statutory mandate from Congress, *Lincoln Mills* makes clear that this Court has a unique responsibility to "fashion" a federal common law that adequately addresses and remedies conduct that results in a violations of a labor agreement. *Lincoln Mills*, 353 U.S. at 103-04. Congress has not suggested otherwise, and its silence supports the Court's role as the author and arbiter of federal common law under § 301(a). Certiorari should be granted so that the Court can fulfill that Congressional mandate.[10]

---

[10] In the Ninth Circuit, the IBT argued that any arguable gap in federal labor law was covered by two other sections of the LMRA—§ 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B), and § 303, 29 U.S.C. § 187—which regulate unfair labor practices under the National Labor Relations Act. However, the IBT also maintained that §8(b)(4)(B) does not encompass the activity alleged here—a position which demonstrates very clearly that the gap described above is real and material. Moreover, that the International Union's conduct arguably constituted an unfair labor practice begs the question of whether this Court has jurisdiction under § 301(a). This Court has specifically held that claims which are alleged as an unfair labor practice but also constitute a violation of the labor agreement do not oust federal courts of jurisdiction

Continued on following page

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, certiorari should be granted with respect to the second question presented.

Respectfully submitted,

Michael E. Kennedy
General Counsel
The Associated
General Contractors of
America, Inc.
2300 Wilson Boulevard,
Suite 400
Arlington, VA 22201
703-837-5335

WILLIAM BEVAN III
DAVID J. BIRD*
REED SMITH LLP
435 Sixth Avenue
Pittsburgh, PA 15219
412-288-3131

Counsel for Amicus Curiae The Associated General Contractors of America, Inc.

*Counsel of Record

May 1, 2009

Continued from previous page

under § 301(a). *Smith v. Evening News Assn.*, 371 U.S. at 198-200. In any event, uncertainty and confusion concerning federal remedies available under § 301(a) and other provisions of the LMRA only further show why this Court's review is needed.

AMICUS CURIAE BRIEF

No. 08-1214

Supreme Court, U.S.
FILED
APR 29 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GRANITE ROCK COMPANY,

Petitioner,

v.

THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS & TEAMSTERS LOCAL 287,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE CENTER ON NATIONAL LABOR POLICY, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER GRANITE ROCK COMPANY

MICHAEL E. AVAKIAN*
CENTER ON NATIONAL
LABOR POLICY, INC.
5211 Port Royal Road, Suite 610
North Springfield, VA 22151
(703) 321-9180

Attorney for Amicus Curiae
**Counsel of Record*

QUESTIONS PRESENTED

1. Whether Granite Rock Co. is entitled to a judicial proceeding to determine contract formation where it has not consented to arbitration of this issue.

2. Whether a §301(a) action is available against the International Brotherhood of Teamsters in this case in view of the strong public policy in favor of holding parent unions liable for the acts of their locals.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. ALL PARTIES ARE ENTITLED TO A JUDICIAL PROCEEDING TO DETERMINE THE THRESHOLD QUESTION WHETHER A CONTRACT EXISTS BEFORE ARBITRATION CAN PROCEED 6

A. The Court of Appeals Finding That the Existence of an Arbitration Provision Within a Contested CBA Is Within the Province of an Arbitrator to Decide, Necessitates this Court's Review 7

B. The Ninth Circuit's Ruling Implements a Change in Federal Policy Contrary to Decisions in the Federal Courts of Appeals and in State Courts 11

C. This Court Should Resolve the Implicit Applicability of the FAA to Labor Cases and the Inherent Tension in National Policy Between Resolving Commercial and Labor Disputes 14

II. AN LMRA §301(a) ACTION IS AVAILABLE AGAINST THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS IN THIS CASE IN VIEW OF THE STRONG PUBLIC POLICY IN FAVOR OF HOLDING PARENT UNIONS LIABLE FOR THE ACTS OF THEIR LOCALS 17

CONCLUSION 24

TABLE OF AUTHORITIES

CASES

Page

14 Penn Plaza LLC v. Pyett,
129 S. Ct. 1456 (2009) 8

AT&T Technologies, Inc. v. Communication Workers,
475 U.S. 643 (1986) 4, 7, 9

Alexander v. Int'l of Operating Engineers, AFL-CIO,
624 F.2d 1235 (5th Cir. 1980) 20

Alexander v. Local 496, Laborers' Int'l Union of North America,
177 F.3d 394 (6th Cir. 1999) 22

Allen v. Int'l Alliance of Theatrical, Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO,
338 F.2d 309 (5th Cir. 1964) 20

Allis-Chalmers Corp. v. Lueck,
471 U.S. 202 (1985) 19

Boys Markets, Inc. v. Retail Clerk's Union, Local 770,
398 U.S. 235 (1970) 6, 11, 12

Briggs & Stratton Corp. v. Local 232, Int'l Union, Allied Industrial Workers of America (AFL-CIO),
36 F.3d 712 (7th Cir. 1994) 5

Buckeye Check Cashing Inc. v. Cardegna,
546 U.S. 440 (2006) 4

Cagle's Inc. v. NLRB,
588 F.2d 943 (5th Cir. 1979) 21

Carbon Fuel Co. v. UMWA,
444 U.S. 212 (1979) 20

Circuit City Stores Inc. v. Adams,
532 U.S. 105 (2001) 16

Coca-Cola Bottling Co. of New York Inc. v. Soft Drink and Brewery Workers Union Local 812, Int'l Brotherhood of Teamsters,
242 F.3d 52 (2d Cir. 2001) 15

Construction Trades Council v. Selby-Battersby & Co.,
359 U.S. 952 (1959) 20

Dowd v. Int'l Longshoremen's Assn., AFL-CIO,
975 F.2d 779 (11th Cir. 1992) 21, 23

Electrical Workers, AFL-CIO v. Myers,
434 U.S. 801 (1977) 22

First Options of Chicago, Inc.,
514 U.S. 938 (1995) 5, 10

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 16

Granite Rock Co. v. Int'l Brotherhood of Teamsters, Freight Construction, General Drivers, Warehousemen & Helpers Local 287 (AFL-CIO) et al.,
546 F.3d 1169 (9th Cir. 2008) 3, 4, 9, 19

H.K. Porter Co. v. NLRB,
397 U.S. 99 (1970) 6

Int'l Bhd. of Electrical Workers, AFL-CIO v. NLRB,
487 F.2d 1113 (D.C. Cir. 1972) 23

Int'l Chemical Workers Union v. Columbian Chemicals Co.,
331 F.3d 491 (5th Cir. 2003) 15

Intern. Ass'n of Mach.& Aerospace Workers, AFL-CIO v. Wilson Trailer Co.,
289 N.W.2d 608 (Iowa 1980) 12

International Longshoremen's and Warehousemen's Union Local 8 v. Pacific Maritime Ass'n,
133 Or. App. 245, 889 P.2d 1358 (Or.App. 1995) 12

Johnson v. California,
545 U.S. 162 (2005) 11

Kostecki v. Dominick's Finer Foods, Inc. of Illinois,
361 Ill. App. 3d 362, 836 N.E.2d 837 (Ill.App. 1 Dist. 2005) 12

Litton Financial Printing Division v. NLRB,
501 U.S. 190 (1991) 8

Local Union No. 898 of the Int'l Brotherhood of Electrical Workers, AFL-CIO v. XL Electric Inc.,
380 F.3d 868 (5th Cir. 2004) 9

McCarroll v. Los Angeles County District Council of Carpenters,
315 P.2d 322 (Cal. 1957) 13

Mendez v. Puerto Rican Int'l Companies Inc.,
553 F.2d 709 (3d Cir. 2009) 8

Myers v. Gilman Paper Corp.,
544 F.2d 837 (5th Cir. 1977) 22

NLRB v. Denver Building & Construction Trades Council,
341 U.S. 675 (1951) 23

NLRB v. Int'l Longshoremen's and Warehousemen's Union,
210 F.2d 581 (9th Cir. 1954) 21

NLRB v. Int'l Union, UMWA, ,
727 F.2d 954 (10th Cir. 1984) 20

NLRB v. Millwrights' Local 2232, District Council of Houston and Vicinity,
277 F.2d 217 (5th Cir. 1960) 20

NLRB v. National Assn. of Broadcast Employees and Technicians, AFL-CIO, Local 31,
631 F.2d 944 (D.C. Cir. 1980) 20

Nagrampa v. MailCoups Inc.,
469 F.3d 1257 (9th Cir. 2006) 15

Oil, Chemical and Atomic Workers Intern. Union, AFL-CIO v. Sandvik,
102 Wash. App. 764, 10 P.3d 470 (Wash App. Div. 3, 2000) 12

Peters v. Rivers Edge Min., Inc., ---,
S.E.2d -- 2009 WL. 804116 (W.Va.,2009) 12

Prima Paint Corp. v. Flood & Conklin Mfg. Co.,
388 U.S. 395 (1967) 15

Quelimane Co. v. Stewart Title Guaranty Co.,
960 P.2d 513 (Cal. 1998) 19

Reichold Chemicals, Inc.,
277 N.L.R.B. 639 (1985) 6

Riverton Coal Co. v. UMWA,
453 F.2d 1035 (6th Cir. 1972) 22

Selby-Battersby & Co. v. NLRB,
259 F.2d 151 (4th Cir. 1958) 20

Service Employees Union, Local No. 87,
291 N.L.R.B. 82 (1988) 22

Sheet Metal Workers' Int'l Assn., AFL-CIO v. NLRB,
293 F.2d 141 (D.C. Cir. 1961) 23

Sheet Metal Workers Union, Local No.2, 203,
N.L.R.B. 954 (1973) 23

Shell Oil Co.,
77 N.L.R.B. 1306 (1948) 6

Star Kist Samoa Inc.,
237 N.L.R.B. 238 (1978) 21

Teledyne Inc. v. Kone Corp.,
892 F.2d 1404 (9th Cir. 1989) 15, 17

Textile Workers Union of America v. Lincoln Mills of Alabama,
353 U.S. 448 (1957) 14

United Steelworkers of America v. American Manufacturing Co.,
363 U.S. 564 (1960) 14

Warehouse, Processing, Distribution Workers Union, Local 26 v. Hugo Neu Proler Co.,
65 Cal. App. 4th 732, 76 Cal. Rptr. 2d 814
(Cal.App. 2d Dist. 1998) 12

Wells v. Int'l Union of Op. Engrs, Local 181,
303 F.2d 73 (6th Cir. 1962) 24

Westmoreland Coal Co. Inc. v. Int'l Union, UMWA,
910 F.2d 130 (4th Cir. 1990) 19

LEGISLATIVE HISTORY

S. Rep. No. 105, 80th Cong., 1st Sess. (1947) 18

STATUTES

Federal Arbitration Act, 9 U.S.C. §§1 *et seq* 5

Labor Management Relations Act, 29 U.S.C. §185(a) 2, 4

SECONDARY LEGAL SOURCES

John Danforth, Tortious Interference With Contract: A Reassertion of Society's Interest in Commercial Stability and Contractual Integrity, 81 Colum. L. Rev. 1491, 1511 (1981) 19

S. Cole, Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees, 64 UMKC L. Rev. 449, 466 (1996) 16

William B. Gould IV, Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration, 55 Emory L.J. 609, 640-43 (2006) 16

Jonathan M. Strang, *The Chicken Comes First: Who Decides if an Arbitrator Has Jurisdiction to Arbitrate?,* 16 Fed. Circuit B.J. 191 (2006) 17

INTRODUCTION

Pursuant to Supreme Court Rule 37.2(a), the Center on National Labor Policy Inc. ("Center") submits this brief *amicus curiae* in support of Petitioner Granite Rock Co. All parties have given written consent to the filing of this brief.[1]

INTEREST OF THE *AMICUS CURIAE*

The Center is a public interest legal foundation chartered to provide legal assistance to individuals whose statutory and constitutional rights in the labor arena have been violated by powerful, organized interests such as labor unions and governmental entities.

The Center, as a public-interest organization, believes that the individual rights of consumers, taxpayers, workers, and public citizens are paramount to the collective rights of private organizations such as labor unions. The Center has filed briefs amicus curiae advocating the validity of this public policy interest in other cases before this Court, including *Caterpillar Inc. v. Int'l Union, United Automobile Aerospace and Agricultural Implement Workers of America and its affiliated Local Union 786*, No. 96-1925; *Int'l Union, United Mine Workers v. Bagwell*, No. 92-1625; *Koons Ford of Annapolis Inc. v. NLRB*, No. 87-1305; *Schriver v. Pennsylvania Building and Construction Trades Council*, No. 80-1257; and *New York Telephone Co. v. N.Y.S. Department of Labor*, No. 77-961.

---

[1]Letters of consent have been filed with the Clerk of Court. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that this brief was not prepared, written, funded or produced by any person or entity other than *amicus curiae* or its counsel.

The parties to this case will focus on the arbitrability of the issue of contract formation and the availability of a cause of action under §301(a) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §185(a), on the facts herein. Equally important, however, and critical to establishing the context for evaluating these questions, are the strong public policies in favor of protecting federal statutory and constitutional rights through judicial proceedings, particularly in labor cases, and in holding parent unions liable for the acts of their locals.

The Center's commitment to the public interest is at stake in these questions. Beyond these particular issues, however, the Center has an interest in the protection of the right of judicial review, particularly in labor cases, and in the accountability of labor unions generally, both of which are challenged by the unions' positions in this case.

The Center is in a unique position to fully advocate the rights of the public and of those individuals who would suffer from any compromise of the important policies at stake in this case.

The Center's participation will therefore bring to this case a diverse perspective not presently represented and assist this Court in fully considering the public interest.

STATEMENT OF THE CASE

This case arises on a Petition for a Writ of Certiorari to the United States Court of Appeals for the

Ninth Circuit. *Granite Rock Co. v. Int'l Brotherhood of Teamsters, Freight Construction, General Drivers, Warehousemen & Helpers Local 287 (AFL-CIO) et al.*, 546 F.3d 1169 (9th Cir. 2008), which affirmed in part and reversed and remanded in part decisions of the United States District Court for the Northern District of California.

STATEMENT OF FACTS

Before the expiration of a collective bargaining agreement between Granite Rock Co. and Local 287 on April 30, 2004, the parties began negotiations, and Rome Aloise, the administrative assistant to the General President of the International Brotherhood of Teamsters ("IBT") (who represented the interests of IBT and other local unions affiliated with the IBT in the negotiations) advised Local 287 that certain provisions of the agreement were inadequate. *See* 546 F.3d at 1171.

In June 2004, after a collective bargaining agreement between Granite Rock Co. and Local 287 expired, Local 287 members went on strike. *See ibid.* There was a new collective bargaining agreement which contained a "no-strike" clause and required the parties to arbitrate "[a]ll disputes arising under this agreement." *See id.* at 1171-72. At the conclusion of the successful bargaining session Local 287's business representative George Netto told Granite Rock Co. that they would stop picketing but also raised the topic of a "back-to-work" agreement to provide for the terms under which the parties would return to work, including liability for actions taken during the strike. *Id.* at 1171. The new agreement was allegedly ratified on July 2, 2004, *see id.* at 1171-72,

but this is disputed, *see id.* at 1172.

On July 5, 2004, Aloise and Local 287 members instructed workers not to return to work the next day. On July 6, 2004, Netto demanded a back-to-work agreement which would explicitly shield Local 287, its members and IBT from any liability arising from the strike. Granite Rock Co. refused to sign such an agreement, and Local 287 continued its strike. *Ibid.*

Granite Rock Co. sued Local 287 for breach of contract and IBT for tortious interference with contract, both in the Northern District of California and under §301(a) of the Labor Management Relations Act ("LMRA" or "Labor Act"), 29 U.S.C. §185(a). The district court granted IBT's motion to dismiss under Fed. R. Civ. Proc. 12(b)(6), on the ground that Granite Rock Co. had failed to state a claim against it under §301(a), and Granite Rock Co. timely appealed. However, the district court denied Local 287's motion to compel arbitration of the question of contract ratification, and Local 287 timely appealed. *Ibid.*

The United States Court of Appeals for the Ninth Circuit affirmed the dismissal of the claims against IBT, *id.* at 1176, but reversed the denial of Local 287's motion to compel arbitration of contract ratification, *id.* at 1172.

SUMMARY OF ARGUMENT

The court of appeals' ordered arbitration to decide the existence of a collective bargaining agreement between the parties, where Granite Rock Co. had not consented to arbitration of this question. The presumption from this Court's jurisprudence arising from *AT&T Technologies,*

Inc. v. Communication Workers, 475 U.S. 643 (1986), and *First Options of Chicago, Inc.*, 514 U.S. 938, 944 (1995), is not in favor of an arbitrator ruling on his/her own jurisdiction. This question raises numerous issues, conflicts with this Court's applicable decisions on the arbitrability of arbitrability; the applicability of state law under Section 301 of the Labor Act on the arbitrability of arbitrability, the doctrine of severability, and how broad may an arbitration clause be read, as set forth in *AT&T Technologies, Inc.*, and whether such a case may depend on the applicability of the Federal Arbitration Act, 9 U.S.C. §§1 *et seq.*, to this case.

The Ninth Circuit's decision is contrary to core considerations under the Labor Act and is based on a misapplication of this Court's precedent, resolution of which may require reconciliation of this Court's previous decisions.

The interpretation of a broad arbitration clause, again in conflict with the decisions of other federal circuit courts and California and other state courts of last resort as well as of this Court, follows a dangerous tendency among other courts to produce an order to arbitrate arbitrability in a dispute *which itself may not be arbitrable.*

The other issue in this appeal concerns the court of appeals' interpretation of §301(a), contrary to the statutory purpose of repose in the legislative history, to *eliminate* Granite Rock Co.'s remedy against the international union. While resolving the conflict among the federal circuit courts regarding the availability of a §301(a) action for tortious interference with a collective bargaining

agreement, this Court should take into account the strong public policy remedy in favor of holding parent unions (and third parties) liable for the acts of their locals (agents) that interfere with stable collective bargaining relationships the Congress unquestionably chose to protect and preserve.

These important questions are ripe for review.

REASONS FOR GRANTING THE PETITION

I. ALL PARTIES ARE ENTITLED TO A JUDICIAL PROCEEDING TO DETERMINE THE THRESHOLD QUESTION WHETHER A CONTRACT EXISTS BEFORE ARBITRATION CAN PROCEED.

In collective bargaining it is settled that a union's agreement not to strike may be exchanged as the *quid pro quo* for a grievance-arbitration provision. *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 248-49 (1970); *Reichold Chemicals, Inc.*, 277 N.L.R.B. 639, 640 (1985), or as a condition of reaching agreement. *Shell Oil Co.*, 77 N.L.R.B. 1306, 1308 (1948). In the absence of a collective bargaining agreement, parties may exercise self-help and economic weapons, such as lock-outs or strikes. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 109 (1970). Importantly, the Court observed that, "[i]t cannot be said that the Act forbids an employer or a union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining." 397 U.S. at 109.

In the present case, Local 287 went on strike

against Granite Rock Co. asserting no agreement and engaged in strike behavior against the Company which clearly demonstrated that the Union believed no collective bargaining agreement with a no-strike clause had been reached with the Company. Since the existence of an agreement was in question, reinforced by the unions' economic behaviors, Granite Rock Co. sued to enforce compliance with the agreement.

The Ninth Circuit's decision requires this Court's review to resolve numerous conflicts now created, including a well-developed conflict between other courts of appeals, decisions of the Supreme Court, decisions of state courts on the federal question, including California, and the federal common law involving labor contracts. Each of these conflicts are discussed below.

A. The Court of Appeals Finding That the Existence of an Arbitration Provision Within a Contested CBA Is Within the Province of an Arbitrator to Decide, Necessitates this Court's Review.

The federal policy supporting arbitration has been settled as an issue for judicial determination and not an arbiter, unless the parties clearly and unmistakably provide otherwise. In this case, however, the court of appeals misapplies the law and decides this important federal question in a way which conflicts with this Court's applicable decisions and decisions in other federal and state courts.

In *AT&T Technologies Inc.* v. Communication Workers, 475 U.S. 643, 648-49 (1986), vacating a decision

which had affirmed an order for arbitration of arbitrability, this Court reaffirmed that,

> arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration [citations omitted].

Accord, Litton Financial Printing Division v. NLRB, 501 U.S. 190, 208 (1991) ("a party cannot be forced to arbitrate the arbitrability question" (citation omitted)) (reversing portion of decision which had refused to enforce Board's order that certain grievances were not arbitrable); *see also Mendez v. Puerto Rican Int'l Companies Inc.*, 553 F.2d 709, 711 (3d Cir. 2009).

Therefore, "the question of arbitrability – whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance – is undeniably an issue for judicial determination." *See AT&T Technologies Inc.*, 475 U.S. at 649; *accord, Litton Financial Printing Division*, 501 U.S. at 208 ("[w]hether or not a company is bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the court"); *see also 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1473 (2009) (rejecting respondents' argument that "the particular CBA at issue here does not clearly and unmistakably require them to arbitrate their ADEA claims" where "respondents did not raise these contract-

based arguments *in the District Court or the Court of Appeals*" (emphasis added)); *Local Union No. 898 of the Int'l Brotherhood of Electrical Workers, AFL-CIO v. XL Electric Inc.*, 380 F.3d 868, 870 (5th Cir. 2004) ("the question of arbitrability is a question for the court") (affirming refusal to enforce arbitration award where contract was not in effect). Similarly, a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy is also for the court to decide. *See AT&T Technologies Inc.*, 475 U.S. at 652.

Local 287's dispute of the ratification date of the new collective bargaining agreement raises a question of arbitrability because its dispute affects whether or not there was a contract in effect during the continuation of the strike on and after July 5, 2004. Since Granite Rock Co. (and also the International Brotherhood of Teamsters, which was not a party to the agreement) never agreed to arbitrate this particular issue, the court of appeals decision in this case conflicts with *AT&T Technologies Inc.* and *Litton Financial Printing Division.*

AT&T Technologies Inc., 475 U.S. at 649, holds that "*[u]nless the parties clearly and unmistakably provide otherwise*, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator" (emphasis added). The court of appeals at A-16; 546 F.3d at 1177 n.4, reaches its result in this case by disregarding this holding, relying instead on the subsequent, more general and contrary language in *AT&T Technologies Inc.* that,

> [a]n order to arbitrate the particular

> grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

By relying on the wrong language from *AT&T Technologies Inc.*, the court of appeals has decided this important federal question in this case in a way which conflicts with this Court's clearly applicable decision in that case.

This Court reaffirmed *AT&T Technologies Inc.*'s more specific holding that the court should decide arbitrability in *First Options of Chicago, Inc.*, 514 U.S. at 944: "*Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so*" (emphasis added, citations omitted) (affirming finding that arbitrability was subject to independent review by the courts).

In *First Options of Chicago, Inc.*, 514 U.S. at 943, this Court also confirms the principles that "[i]f ... the parties did not agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently" (emphasis omitted) and that "arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration."

The ruling of the Ninth Circuit circumscribes these important markers by overlooking the policy this Court directed to be implemented. The Ninth Circuit improperly drew up the requirement that an independent challenge to an arbitration clause must be asserted to obtain a judicial ruling. A-14, 18. This very condition is contrary to the long line of decisions from this Court and the federal circuit courts and must be resolved.

B. The Ninth Circuit's Ruling Implements a Change in Federal Policy Contrary to Decisions in the Federal Courts of Appeals and in State Courts.

Concurrent state court jurisdiction under Section 301 of the Labor Act and the FAA also requires this Court to consider the arbitrability conflict issue as applied by the state courts.

A ground for granting a writ of certiorari is a conflict between a decision of the court of appeals and the highest court of a state on a federal question. *See Johnson v. California*, 545 U.S. 162, 164 (2005) (certiorari granted because of a conflict between the 9th Circuit and the Supreme Court of California over jury challenges in criminal trials). The court of appeals' opinion below disregards California state decisions on federal labor law.

Importantly, Congress did not foreclose state court jurisdiction to enforce collective bargaining agreements under Section 301(a), but intended the enactment to "*supplement* and not to encroach upon, the pre-existing jurisdiction of the state courts." *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 245 (1970).

Recognizing that "a certain diversity exists among the state and federal systems in matters of procedural and remedial detail, *id.* at 246, the "relative uniformity" in the federal and state court systems was to prevail, *id.*, and therefore "Congress deliberately chose to leave the enforcement of collective agreements 'to the usual process of the law,'" *Arnold v. Carpenters District Council of Jacksonville*. 417 U.S. 12, 16 (1974), quoting *Dowd Box Co. v. Courtney*, 368 U.S. 502, 513 (1962), which meant that Section 301 claims "may be brought in either state or federal courts." *Id.*[2]

First Options of Chicago, Inc., *id.* at 944, instructs that "when deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally ... should apply ordinary state-law principles that govern the formation of contracts," but there is no indication in this case that the court of appeals considered California state law.

In California, "[t]he arbitrability of a dispute may

---

[2]The state courts have indeed handled labor contract cases under Section 301 and applied the prevailing arbitration standards to them. *See e.g.,Peters v. Rivers Edge Min., Inc.*, --- S.E.2d ----, 2009 WL 804116 (W.Va.,2009); *Kostecki v. Dominick's Finer Foods, Inc. of Illinois*, 361 Ill.App.3d 362, 836 N.E.2d 837, 843 (Ill.App. 1 Dist. 2005); *Oil, Chemical and Atomic Workers Intern. Union, AFL-CIO v. Sandvik*, 102 Wash. App. 764, 10 P.3d 470, 474 (Wash App. Div. 3, 2000); *Warehouse, Processing, Distribution Workers Union, Local 26 v. Hugo Neu Proler Co.*, 65 Cal.App.4th 732, 76 Cal.Rptr.2d 814 (Cal.App. 2d Dist. 1998); *International Longshoremen's and Warehousemen's Union Local 8 v. Pacific Maritime Ass'n*, 133 Or.App. 245, 889 P.2d 1358 (Or.App. 1995); Local Lodge No. 1426, *Intern. Ass'n of Mach.& Aerospace Workers, AFL-CIO v. Wilson Trailer Co.*, 289 N.W.2d 608 (Iowa 1980).

itself be subject to arbitration *if the parties have so provided in their contract*," but this is "unusual" and still requires the court to decide this question:

> [E]ven when the parties have conferred upon the arbiter the *unusual* power of determining his own jurisdiction, the court cannot avoid the necessity of making a certain threshold determination of arbitrability, namely, whether the parties have in fact conferred this power on the arbiter.

McCarroll v. Los Angeles County District Council of Carpenters, 315 P.2d 322, 333 (Cal. 1957), *cert. denied*, 355 U.S. 932 (1958) (emphasis added) (affirming state court injunction against challenge that issue should have been referred to arbitration).

So California law, contrary to the court of appeals in this case, presumes that the court will decide arbitrability:

> Whatever the merits of the procedure, we think it sufficiently outside the usual understanding of the relations of court and arbiter and their respective functions to assume that the parties expected a court determination of arbitrability unless they have clearly stated otherwise.

Id. at 334.

A California court could not have found that the parties had authorized the arbitrator to determine arbitrability in this case without first finding that they had

formed a contract, but the court of appeals in this case refers this issue to the arbitrator instead. The court of appeals' opinion in this case therefore decides this important federal question in a way which may conflict with this Court's decision in *First Options* and those of numerous state courts.

C. This Court Should Resolve the Implicit Applicability of the FAA to Labor Cases and the Inherent Tension in National Policy Between Resolving Commercial and Labor Disputes.

This Court should settle the important question whether the FAA and its requirement to consider state law apply to a case like this as the Ninth Circuit presumes, and it appears that there would be a conflict among the federal circuit courts on this issue. The Ninth Circuit applied FAA caselaw to reach its result in the instant case.

It is well established that "the substantive law to apply in suits under §301(a) is *federal* law, which the courts must fashion from the policy of our national labor laws." *See Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 456 (1957) (emphasis added). "Federal interpretation of the federal law will govern, not state law." *Id.* at 457; *see also United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 567 (1960) (decrying "preoccupation with ordinary contract law" in Labor Management Relations Act case). But, *First Options of Chicago, Inc.* (and also *Mendez*) arise under the FAA, as do at least four of the decisions which are critical to the court of appeals' opinion in this case, *see Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 443 (2006);

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 397 (1967); *Nagrampa v. MailCoups Inc.*, 469 F.3d 1257, 1263 (9th Cir. 2006); and *Teledyne Inc. v. Kone Corp.*, 892 F.2d 1404, 1410 (9th Cir. 1989).

Since *these are not §301 or even labor law cases*, it is impossible to determine whether they should control this case without resolving the conflict among the federal circuit courts on the same important matter regarding whether the FAA applies to §301 cases, *cf. Int'l Chemical Workers Union v. Columbian Chemicals Co.*, 331 F.3d 491, 494 (5th Cir. 2003) ("when reviewing a case involving a CBA and arising under Section 301, courts are not obligated to rely on the FAA"); *Coca-Cola Bottling Co. of New York Inc. v. Soft Drink and Brewery Workers Union Local 812, Int'l Brotherhood of Teamsters*, 242 F.3d 52, 53 (2d Cir. 2001) ("[w]e hold that in cases brought under Section 301 ..., the FAA does not apply") (rejecting jurisdictional challenge based on FAA); *with Briggs & Stratton Corp. v. Local 232, Int'l Union, Allied Industrial Workers of America (AFL-CIO)*, 36 F.3d 712, 715 (7th Cir. 1994), *reh'g denied*, 1994 WL 716867 (7th Cir. 1994), *cert. denied, United Paperworkers Int'l Union, AFL-CIO v. Briggs & Stratton Corp.*, 514 U.S. 1126 (1995) ("our circuit is among the minority that ... applies the Arbitration Act to most collective bargaining agreements").

This Court should, but it does not appear that it has yet settled this important question of federal law. In *Textile Workers Union of Am.*, "[a]lthough the Court decided the enforceability of the arbitration provisions in the collective-bargaining agreements by reference to §301 of the Labor Management Relations Act, 1947, 29 U.S.C. §185," "it did not reject the Court of Appeals' holdings that

the arbitration provisions would not otherwise be enforceable pursuant to the FAA." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 41 (1991) (Stevens, J., dissenting). *See William B. Gould IV, Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 Emory L.J. 609, 640-43 (2006) ("there is now both division and doubt on the issue").

Of course, the 5-4 decision in *Circuit City Stores Inc. v. Adams*, 532 U.S. 105, 119 (2001), also does not settle either the applicability of the FAA to §301 cases or whether a collective bargaining agreement constitutes an employment contract. Section 2 of the FAA makes written agreements to arbitrate valid "in any maritime transaction or a contract evidencing a transaction involving commerce; Section 1 exempts certain employment contracts from the FAA.[3]

In fact, organized labor abandoned its opposition to the FAA on the assumption that it did not apply to labor law, see *id.* at 126-27 (Stevens, J., dissenting) ("The legislation was reintroduced in the next session of Congress with Secretary Hoover's exclusionary language added to [9 U.S.C.] §1, and the amendment eliminated organized labor's opposition to the proposed law").

Professor Gould discusses the importance of

---

[3]*See also* Hearings on S.4213 and S.4214 Before the Subcommittee on the Judiciary of the Senate Judiciary Committee, 67th Cong., 4th Sess. 9 (1923) ("not intended to be an act referring to labor disputes, at all"); *quoted in* S. Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. Rev. 449, 466 (1996).

whether a collective bargaining agreement constitutes an employment contract and is therefore within the scope of the FAA, with respect to matters such as the expeditiousness of arbitration and the availability of discovery and judicial review which may affect many cases other than this one. *See* Gould, *supra*, at 644-50.

If the FAA applies to this case, an issue which this Court needs to decide, then the court of appeals' disregard of *First Options of Chicago, Inc.*'s instruction to consider state law amounts to the decision of an important federal question in a way which conflicts with an applicable decision of this Court. Since the issue in *Teledyne Inc.* was whether the contract was ever finalized, the Ninth Circuit was incorrect in that case, *see* 892 F.2d at 1410, to rely on *Prima Paint Corp.* By relying on *Buckeye Check Cashing Inc.* and *Prima Paint Corp.*, the Ninth Circuit repeats the error it already made in *Teledyne Inc.* *See* Jonathan M. Strang, *The Chicken Comes First: Who Decides if an Arbitrator Has Jurisdiction to Arbitrate?*, 16 Fed. Circuit B.J. 191 (2006).

II. AN LMRA §301(a) ACTION IS AVAILABLE AGAINST THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS IN THIS CASE IN VIEW OF THE STRONG PUBLIC POLICY IN FAVOR OF HOLDING PARENT UNIONS LIABLE FOR THE ACTS OF THEIR LOCALS.

Notwithstanding the conflict among the federal circuit courts regarding the availability of a §301(a) action for tortious interference with a collective bargaining

agreement, the goal of §301(a) is labor stability and there is a strong public policy in favor of holding parent unions liable for the acts of their locals. The court of appeals' denial of a contractual or tort remedy in this case is contrary to this statutory purpose and public policy by eliminating any remedy which Granite Rock Co. could apply for from the district court against the international union.

Congress enacted §301(a) in 1947 following a period of increased strikes. S. Rep. No. 105, 80th Cong., 1st Sess., p.2 (1947); *accord*, H. Rep. No. 245, 80th Cong., 1st Sess., p.4. "During the last few years, the effects of industrial strife have at times brought our country to the brink of general economic paralysis." H. Rep. No. 245 at 3.

Labor stability has been the goal of §301(a) from the beginning, S. Rep. No. 105 at 15-16:

> In the judgment of the committee.... We feel that the aggrieved party should also have a right of action in the federal courts .... If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations .... Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.

The existence of a tort as well as a contract remedy advances this goal substantially by protecting the contract and signifying "society's interest in contractual integrity

and thus augments the extent to which existing contracts will appear reliable and will tend to structure a market economy." John Danforth, *Tortious Interference With Contract: A Reassertion of Society's Interest in Commercial Stability and Contractual Integrity*, 81 Colum.L.Rev. 1491, 1511 (1981) (citation omitted).

But for §301(a), Granite Rock would have had a remedy against the International Brotherhood of Teamsters under California state law for its interference with the collective bargaining agreement according to the Ninth Circuit. *See Quelimane Co. v. Stewart Title Guaranty Co.*, 960 P.2d 513, 530-31 (Cal. 1998). But, §301(a) preempts state tort as well as contract claims which involve interpretation of a collective bargaining agreement. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985). Contrary to Congress' clear intent, the court of appeals in this case therefore has left Granite Rock Co. without a remedy against the international union.

The court of appeals expressly acknowledges the conflict among the circuit courts regarding the availability of a §301(a) action for tortious interference with a collective bargaining agreement. *See* 546 F.3d at 1174-75. While resolving this conflict, this Court should take into account the strong public policy in favor of holding parent unions liable for the acts of their locals. Decisions from numerous circuit courts reflect this policy.

In *Westmoreland Coal Co. Inc. v. Int'l Union, UMWA*, 910 F.2d 130, 136 (4th Cir. 1990), the court affirmed relief against an international union in a §301(a) case based in part on statements by individual union officials, and specifically distinguished this Court's decision

in *Carbon Fuel Co. v. UMWA*, 444 U.S. 212, 216-18 (1979):

> *Carbon Fuel Co.* is distinguishable. There, the Supreme Court held that an international union which neither instigates, supports, ratifies, nor encourages "wildcat" strikes by local unions cannot be held liable for the actions of the locals. The court was careful to distinguish the situation in *Carbon Fuel Co.* from one in which a local union takes actions, authorized by the parent union, which violate a contract.

Numerous other decisions also have recognized the liability of international or other parent unions for the acts of local unions. *See, e.g., NLRB v. Int'l Union, UMWA*, 727 F.2d 954, 956 (10th Cir. 1984) (international union was responsible for violations by district and local unions); *NLRB v. National Assn. of Broadcast Employees and Technicians, AFL-CIO, Local 31*, 631 F.2d 944, 953 (D.C. Cir. 1980)(international union responsible for prohibited activities of local union); *Alexander v. Int'l of Operating Engineers, AFL-CIO*, 624 F.2d 1235, 1241 (5th Cir. 1980); *Allen v. Int'l Alliance of Theatrical, Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO*, 338 F.2d 309, 317-19 (5th Cir. 1964); *NLRB v. Millwrights' Local 2232, District Council of Houston and Vicinity*, 277 F.2d 217, 220-22 (5th Cir. 1960), *cert. denied*, 366 U.S. 908 (1961); *Selby-Battersby & Co. v. NLRB*, 259 F.2d 151, 156 (4th Cir. 1958), *cert. denied, Baltimore Building and Construction Trades Council v. Selby-Battersby & Co.*, 359 U.S. 952 (1959).

In *Dowd v. Int'l Longshoremen's Assn., AFL-CIO*,

975 F.2d 779, 785 (11th Cir. 1992), a secondary boycott case affirming an injunction against an American union which had allegedly violated the National Labor Relations Act by inducing Japanese unions to pressure importers not to import certain items, the court references "the liberal application of agency concepts appropriate in the labor context" and specifically notes that in labor cases *an agency or joint venture relationship may exist even where some of the elements required in an ordinary tort or contract dispute are absent. Id.* at 91.[4]

Further, the *Dowd* court's citation to *Cagle's Inc. v. NLRB*, 588 F.2d 943, 947-48 (5th Cir. 1979) (where employer encouraged Chamber of Commerce director to campaign against formation of union and failed to effectively disavow such interference, employer was responsible for director's conduct even though director was not employer's formal agent); and *Star Kist Samoa Inc.*, 237 N.L.R.B. 238 (1978) (employer was responsible for anti-union activities of community organization, even where it had no right to demand or control the actions of the community organization).

Even an international union's mere awareness of the conduct and failure to repudiate an agent's acts may create responsibility. *Dowd*, 975 F.2d at 785 n.4, *citing Soft Drink Workers Union, Local No. 812*, 304 NLRB No.

---

[4]In fact, the liability of an international union has been recognized by the Ninth Circuit in remedy for breaches of contractual responsibilities delegated to its local union. In *NLRB v. Int'l Longshoremen's and Warehousemen's Union*, 210 F.2d 581, 584-85 (9th Cir. 1954), the court enforced a Board order that an international union was responsible for the unfair labor practices of a local union under "a general principle of agency law."

22 (1991) (where union was aware of unfair labor practices by member on behalf of union and failed to repudiate conduct, union was responsible for member's actions); and *Service Employees Union, Local No. 87*, 291 NLRB 82 (1988) (picketers acted as agents of union, based upon union's apparent endorsement and ratification, even absent evidence that union actually initiated or endorsed picketing); *see also Alexander v. Local 496, Laborers' Int'l Union of North America*, 177 F.3d 394, 409 (6th Cir. 1999), *cert. denied*, 528 U.S. 1154 (2000) ("where an agency relationship exists, international unions are not only vicariously liable, they have an affirmative duty to oppose the local's discriminatory conduct"); *Myers v. Gilman Paper Corp.*, 544 F. 2d 837, 851 (5th Cir. 1977), *reh'g denied*, 556 F.2d 758 (5th Cir. 1977), *cert. dismissed, Local 741, Int'l Brotherhood of Electrical Workers, AFL-CIO v. Myers*, 434 U.S. 801 (1977) (international union is liable for a local union's discrimination where a "sufficient connection" exists between the two).

The liability of a parent national union has been upheld specifically with respect to the acts of a local union during bargaining. In *Riverton Coal Co. v. UMWA*, 453 F.2d 1035, 1042 (6th Cir. 1972), *cert. denied*, 407 U.S. 915 (1972), the court, remanding for entry of judgment in favor of plaintiff corporations against a national union, states that the,

> UMW, having the power to correct the unlawful action of the local union, and deciding to accept the benefit of it instead of taking appropriate action to halt the strike as it was required to do under the contract, thereby induced and encouraged both the

1964 and the 1966 strike.

Similarly, in *Sheet Metal Workers' Int'l Assn., AFL-CIO v. NLRB*, 293 F.2d 141, 149 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 896 (1961), the court enforced a Board order that an international union was responsible for the unfair labor practices of local unions, including the requirement of certain provisions in collective bargaining agreements. The acts creating liability need not be great. In *Int'l Bhd. of Electrical Workers, AFL-CIO v. NLRB*, 487 F.2d 1113, 1128 (D.C. Cir. 1972), the court affirmed the Board's conclusion that an international union had committed unfair labor practices merely by its routine disposition of an appeal and retention of records regarding a local union's disciplinary actions.

And, the policy favoring liability is so strong that

> where a union affirms prior conduct performed on its behalf, the union may be responsible for the unfair labor practices of another even where the conduct did not bind the union at the time it occurred.

Dowd, 975 F.2d at 786, *citing Service Employees Union, Local No. 87*, 291 NLRB 82 (1988); and *Sheet Metal Workers Union, Local No.2*, 203 NLRB 954, 956 (1973).

All of this, of course, is merely a specific application of the general rule that third parties may not disrupt labor relationships. *See NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 689 (1951) ("[i]t was an object of the strike to force the contractor to terminate Gould & Preisner's subcontract") (reversing

judgment which had set aside Board order against trades council); *Wells v. Int'l Union of Op. Engrs, Local 181*, 303 F.2d 73, 75 (6th Cir. 1962) ("defendants' activities were secondary in nature and were engaged in for the purpose of inducing the Transit-Mix employees not to deliver concrete to the Tye & Wells job site and, therefore, in turn to force Tye & Wells to breach its contract with the United Construction Workers") (affirming judgment against unions for secondary boycott). Yet the court of appeals has effectively endorsed IBT's disruption in this case, contrary to the purpose of §301(a).

CONCLUSION

Wherefore, the Center on National Labor Policy Inc. respectfully requests this Court to grant the Petition for the purpose of reversing the decision of the United States Court of Appeal for the Ninth Circuit.

Respectfully submitted,

MICHAEL E. AVAKIAN*
CENTER ON NATIONAL LABOR POLICY, INC.
5211 Port Royal Rd., Suite 610
North Springfield, VA 22151
(703) 321-9180

Dated: April 29, 2009

*Counsel of Record for *Amicus Curiae*

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
MAY 1 - 2009
OFFICE OF THE CLERK

(4)

No. 08-1214

IN THE
Supreme Court of the United States

GRANITE ROCK COMPANY,
Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS & TEAMSTERS LOCAL 287,
Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, IN SUPPORT OF THE PETITIONER

Quentin Riegel
Of Counsel
National Association of Manufacturers
1331 Pennsylvania Ave., N.W.
Washington, DC 20004-1790
(202) 637-3000

Maurice Baskin
Counsel of Record
Venable LLP
575 7th St., N.W.
Washington, D.C. 20004
(202) 344-4823

Counsel for *Amicus*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....ii

INTERESTS OF THE *AMICUS*.....1

SUMMARY OF ARGUMENT..... 2

ARGUMENT..... 3

I. **BY ALLOWING ARBITRATORS TO DECIDE ISSUES OF CONTRACT FORMATION, THE NINTH CIRCUIT'S DECISION THREATENS TO UNDERMINE THE COLLECTIVE BARGAINING PROCESS AND CREATES A CONFLICT IN THE CIRCUITS**.....3

II. **BY ALLOWING INTERNATIONAL UNIONS TO ESCAPE LIABILITY UNDER SECTION 301 FOR ACTIONS CONTRARY TO THE STATUTE, THE NINTH CIRCUIT'S DECISION CREATES ANOTHER CIRCUIT CONFLICT ON AN ISSUE OF GREAT IMPORTANCE**.....8

CONCLUSION.....11

TABLE OF AUTHORITIES

CASES

Adams v. Suozzi, 433 F. 3d 220 (2d cir. 2005)..... 7

Allis-Chalmers v. Lueck, 471 U.S. 202 (1985)..... 9

AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643 (1986) 6

John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964)..... 6

Microchip Tech. Inc. v. U.S. Philips Corp., 367 F. 3d 1350 (Fed. Cir. 2004) 7

Milne Employees Ass'n v. Sun Carriers, Inc., 960 F.2d 1401 (9th Cir. 1992) 8

Sandvik AB v. Advent Int'l Corp., 220 F. 3d 99 (3d Cir. 2000)..... 7

Sphere Drake Ins. Ltd. v. All Am. Ins. Co., 256 F. 3d 587 (7th Cir. 1995) 7

Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448 (1957)..... 3

United Association of Journeymen and Apprentices v. Georgia Power Co., 684 F.2d 721 (11th Cir. 1982)..... 10

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960)..... 5

Wilkes-Barre Publishing Co. v. Newspaper Guild of Wilkes-Barre, Local 120, 647 F.2d 372, (3d Cir. 1981), *cert. denied,* 454 U.S. 1143 (1982). 10

FEDERAL AND STATE LAWS

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185.....2, 8, 9, 10

OTHER AUTHORITIES

Archibald Cox *et al.*, Labor Law: Cases and Materials 518 (9th ed. 1980).....4

David Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Cal L. Rev. 663 (1973). 4

Frank Cummings & Judge Jacob P. Hart, *Labor Contract Clauses from A to* Z, Emp. and Lab. Rel. L. for the Corp. Couns. and the Gen. Prac., SN020 ALI-ABA 503 (May 1-3, 2008). 4

Malin and Biernat, *Do Cognitive Biases Infect Adjudication? A Study of Labor Arbitrators*, 11 U. Pa. J. Bus. & Emp. L. 175 (Fall 2008).....4

Michael H. LeRoy & Peter Reuille, *As The Enterprise Wheel Turns: New Evidence On The Finality Of Labor Arbitration Awards*, 18 Stan. L. & Pol'y Rev. 191 (2007). 5

R.W. Fleming, The Labor Arbitration Process 31-32 (1965) 3

INTERESTS OF THE *AMICUS* [1]

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

The NAM is filing this *amicus* brief in support of the Petition because the Petition raise two issues that are both of great importance to NAM's members and the business community. The NAM wishes to bring to the Court's attention the adverse impact on public policy and on labor law generally if the Ninth Circuit's aberrant decision is allowed to stand.

---

[1] Pursuant to Supreme Court Rule 37.2, the *Amicus* states that all parties have consented to the filing of this brief, and letters evidencing such consent are being filed with the Court. Pursuant to Supreme Court Rule 37.6, the *Amicus* further states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amicus*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

In a ruling that is completely at odds with the holdings of this Court and the majority of other circuits, the Ninth Circuit has abdicated the proper role of the judiciary in deciding whether parties to collective bargaining have agreed to arbitrate their disputes. The appeals court's holding that employers can be bound to arbitrate issues of contract formation, without the *quid pro quo* of an enforceable no-strike clause under a tentative agreement, threatens to undermine the process of collective bargaining itself. Review by this Court is urgently needed in order to prevent serious injury to the bargaining process. Absent such review, unionized employers generally will be greatly discouraged from entering into tentative agreements with unions that contain arbitration provisions, thereby undermining the goal of labor harmony that Section 301 was intended to achieve.

Of equally great concern to the *Amicus*, the Ninth Circuit's holding bestows undeserved immunity upon international unions who intentionally interfere with collectively bargained agreements of their union locals, in plain violation of Section 301 of the Labor Management Relations Act. The court of appeals decision again creates a conflict with other circuits on an issue of great importance to the broader business community. The Petition should be granted so that the true perpetrators of violations of labor agreements can be held responsible for their actions, and their violations remedied, as the drafters of Section 301 intended.

I. BY ALLOWING ARBITRATORS TO DECIDE ISSUES OF CONTRACT FORMATION, THE NINTH CIRCUIT'S DECISION THREATENS TO UNDERMINE THE COLLECTIVE BARGAINING PROCESS AND CREATES A CONFLICT IN THE CIRCUITS.

The Ninth Circuit's decision enables a labor union to enforce an arbitration clause without being bound by any other aspect of a tentative agreement reached with an employer, including a no-strike clause. See Petition at 10, *et seq*. This holding, if allowed to stand, will have serious adverse consequences for labor relations and the collective bargaining process. Certainly, employers will be much less likely to agree to tentative agreements that include arbitration clauses under this decision.

It is well settled that the primary incentive for employers to sign collective bargaining agreements containing arbitration clauses is that "the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike." *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 455 (1957). *See also* R.W. Fleming, The Labor Arbitration Process 31-32 (1965) ("Indeed, it is apparent that the decisions of the Supreme Court which have so greatly enhanced labor arbitration ... are in large part based on the theory that the arbitration clause is the quid pro quo for the no-strike clause."). Empirical evidence demonstrates the importance of maintaining employers' incentives to

agree to arbitration clauses in tentative agreements, since there would be almost no collective bargaining agreements without such clauses. *See* Archibald Cox *et al.*, Labor Law: Cases and Materials 518 (9th ed. 1980) (estimating that arbitration provisions reflecting this bargained exchange appear in about ninety-six percent of all labor agreements).

Because the no-strike clause and the grievance and arbitration procedure are "the true essence of the typical CBA," the Ninth Circuit's holding would allow a labor union to receive all the benefit of any tentative bargaining agreement without giving up any rights in exchange. Malin and Biernat, *Do Cognitive Biases Infect Adjudication? A Study of Labor Arbitrators*, 11 U. Pa. J. Bus. & Emp. L. 175, 179 (Fall 2008) (quoting David Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Cal L. Rev. 663 (1973)). [2]

In addition, the Ninth Circuit's holding will decrease employers' incentives to sign tentative agreements that include arbitration clauses for fear that an arbitrator will have the power to determine whether an agreement has been completed. The main concern employers will have in this instance is the level of deference courts pay to arbitration

---

[2] As one scholar has put it, "In my view, [a no-strike clause] is the *only* thing management gets out of a collective bargaining agreement; everything else is for the benefit of the union." Frank Cummings & Judge Jacob P. Hart, *Labor Contract Clauses from A to Z*, Emp. and Lab. Rel. L. for the Corp. Couns. and the Gen. Prac., SN020 ALI-ABA 503 (May 1-3, 2008).

decisions, and courts' corresponding hesitancy to review them. For example, in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960), this Court remarked that "refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements." *Enterprise Wheel* went further, stating that a "mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award." Id. at 598.[3]

The logical result of the Ninth Circuit's decision is that employers will be discouraged from agreeing to include an arbitration clause in a tentative agreement, for fear that they will thereby be waiving their right to enforce the tentative agreement in court. This means that there will be fewer tentative agreements. Given the importance of tentative agreements in the bargaining process, which enable parties to feel that progress is being made on a new contract without a disruption to the

---

[3] As a recent study illustrates, arbitration award enforcement is at its peak. Michael H. LeRoy & Peter Reuille, *As The Enterprise Wheel Turns: New Evidence On The Finality Of Labor Arbitration Awards*, 18 Stan. L. & Pol'y Rev. 191, 195 (2007). Courts now enforce awards in close to seventy-six percent of arbitration awards, a marked increase from past years. *Id.* Even more strikingly, courts have enforced between seventy and eighty percent of challenged awards, *regardless of the legal argument*. *See id.*

workflow, this will lead to more labor unrest and work stoppages.

It was for these reasons that this Court held in *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986), that it is the courts and not the arbitrators who must decide in the first instance whether the parties have agreed to arbitrate their disputes at all. As the Court observed, *id.* at 651:

> The willingness of parties to enter into agreements that provide for arbitration of specified disputes would be "drastically reduced,"...if a labor arbitrator had the "power to determine his own jurisdiction." [*Quoting* Cox, *supra*]. Were this the applicable rule, an arbitrator would not be constrained to resolve only those disputes that the parties have agreed in advance to settle by arbitration, but, instead, would be empowered "to impose obligations outside the contract limited only by his understanding and conscience." *Ibid.* This result undercuts the longstanding federal policy of promoting industrial harmony through the use of collective-bargaining agreement, and is antithetical to the function of a collective bargaining agreement as setting out the rights and duties of the parties.

See also John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964) (whether an employer is bound by an agreement containing an arbitration clause is a "threshold question" for the court to decide).

As numerous circuit courts of appeals have further held, this Court's mandate compels judicial resolution of all jurisdictional issues relating to whether the parties have agreed to arbitration in the first place, including contract formation. *See Microchip Tech. Inc. v. U.S. Philips Corp.*, 367 F. 3d 1350, 1358 (Fed. Cir. 2004); *Sandvik AB v. Advent Int'l Corp.*, 220 F. 3d 99 (3d Cir. 2000); *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F. 3d 587 (7th Cir. 1995); and numerous other cases from virtually every circuit other than the Ninth, cited in the Petition at 14-18.

Of particular significance is the Second Circuit's holding in *Adams v. Suozzi*, 433 F. 3d 220 (2d Cir. 2005), which found in direct conflict with the Ninth Circuit here that courts should not compel arbitration before determining whether all conditions precedent to formation of a collective bargaining agreement have occurred. In that case as in this one, a dispute arose over whether a tentative agreement had been submitted to a union's membership for ratification so as to create a final and binding agreement. Though the court ultimately found there that the ratification had not taken place (unlike the present facts), the court made it clear that this was a judicial decision to make, not that of an arbitrator. Rejecting the position now adopted by the Ninth Circuit, and citing this Court's holding in *AT&T*, the Second Circuit declared: "The District Court possessed not only authority, but a duty, to determine whether there ever existed an agreement to arbitrate between the parties." *Id.* at 226.

The Ninth Circuit's decision in the present case ignores or misinterprets this Court's mandate in favor of judicial resolution of issues of contract formation and will have pernicious effects on the process of collective bargaining unless corrected by this Court. For this reason, and to resolve an obvious split in the circuits on this issue of national importance, the *Amicus* asks that the Petition be granted.

II. BY ALLOWING INTERNATIONAL UNIONS TO ESCAPE LIABILITY UNDER SECTION 301 FOR ACTIONS CONTRARY TO THE STATUTE, THE NINTH CIRCUIT'S DECISION CREATES ANOTHER CIRCUIT CONFLICT ON AN ISSUE OF GREAT IMPORTANCE

The Ninth Circuit also held in this case that the International Brotherhood of Teamsters was immune from suit under Section 301, even if the international union compelled its affiliated local union to refuse to honor its previous commitment to the tentative agreement with Granite Rock. As explained in the Petition, at 33, the Ninth Circuit has previously held in *Milne Employees Ass'n v. Sun Carriers, Inc.*, 960 F.2d 1401 (9th Cir. 1992), that Section 301 preempts California tort claims for contractual interference because proving a contract breach is an essential element of such a claim. *Id.* at 1412. The current decision thus leaves employers without any remedy against international unions who directly interfere with agreements that Section 301 was intended to protect. This is an issue of

great concern to the *Amicus* and its members and should be reviewed by this Court.

This Court has held that Section 301 preempts state claims that require interpreting any term of a collective bargaining agreement, such as its no-strike language. *See Allis-Chalmers v. Lueck,* 471 U.S. 202, at 212, 220. Therefore, it should follow that a contractual interference claim "arises under" Section 301 when such a claim cannot be resolved without adjudicating whether a labor contract was breached. The Ninth Circuit failed to so hold, contributing to a severe split in the circuits on this issue.

Absent review and reversal by this Court, many unionized employers will face the prospect of internationally sanctioned strikes that violate local bargaining agreements but cannot be remedied. This subversion of local bargaining agreements by international unions is contrary to the language and intent of Section 301.

The control exercised by the International over Granite Rock's bargaining process was by no means unique to this case. It is very common for international unions to retain control over the bargaining process even though the international is not called upon to sign the actual collective bargaining agreement. For this reason, the Ninth Circuit's decision threatens to have a significant adverse impact beyond the immediate parties to this case.

The *Amicus* fully agrees with the Petitioner's assertion that the Ninth Circuit's holding will cause uncertainty during the term of a collective bargaining agreement regarding recurring economic disputes. See Petition at 35. Because of the control exercised by international unions over their locals, the internationals should be held responsible for violating Section 301 when they order their locals to violate the no-strike provisions of such agreements, as occurred here.

As the Ninth Circuit acknowledged, 546 F. 3d at 1174, its decision on this point conflicts directly with the Third Circuit's decision in *Wilkes-Barre Publishing Co. v. Newspaper Guild of Wilkes-Barre, Local 120,* 647 F.2d 372, 381 (3d Cir. 1981), *cert. denied,* 454 U.S. 1143 (1982). In that case, as in this one, an employer sued a nonsignatory international union for inducing a breach of a labor contract. The Third Circuit held that Section 301(a) jurisdiction "reaches not only suits on labor contracts, but also suits seeking remedies for violations of such contracts." *Id.* at 380, 381 n.6. The Third Circuit rejected the emphasis on labels attached to remedies (as tort or contract) under the federal common law applying Section 301(a). *Id.* at 381. The Ninth Circuit opinion falls prey to exactly such labeling and ignores the realities of the relationship between union

locals and their international controllers.[4]

CONCLUSION

For the reasons set forth above and in the Petition, the Petition should be granted.

Respectfully submitted,

Quentin Riegel
Of Counsel
National Association of Manufacturers
1331 Pennsylvania Ave., N.W.
Washington, DC 20004-1790
(202) 637-3000

Maurice Baskin
Counsel of Record
Venable LLP
575 7th St., N.W.
Washington, D.C. 20004
(202) 344-4823

Counsel for *Amicus*

---

[4] *See also United Association of Journeymen and Apprentices v. Georgia Power Co.*, 684 F.2d 721 (11th Cir. 1982) (agreeing with the reasoning of the Third Circuit in *Wilkes-Barre*).

JOINT APPENDIX

Supreme Court, U.S.
FILED
AUG 27 2009
OFFICE OF THE CLERK

11

No. 08-1214

In The Supreme Court of The United States

GRANITE ROCK COMPANY,
Petitioner,

v.

THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS & TEAMSTERS LOCAL 287,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX
VOLUME 1 OF 2

GARRY G. MATHIASON
Counsel of Record
ALAN S. LEVINS
ADAM J. PETERS
RACHELLE L. WILLS
LITTLER MENDELSON
650 California Street, 20th Floor
San Francisco, CA 94108
Telephone: 415.433.1940

ARTHUR R. MILLER
Of Counsel
NEW YORK UNIVERSITY
SCHOOL OF LAW
40 Washington Square South
Vanderbilt Hall 409D
New York, NY 10012
Telephone: 212.992.8147
Counsel for Petitioner

DUANE B. BEESON
Counsel of Record
BEESON, TAYER & BODINE
1404 Franklin St., 5th Fl.
Oakland, CA 94612
Telephone: 510.625.9700
Counsel for Teamsters Local 287

PETER DAVID NUSSBAUM
Counsel of Record
ALTSHULER BERZON LLP
177 Post St., Suite 300
San Francisco, CA 94108
Telephone: 415.421.7151
Counsel for International Brotherhood of Teamsters, et al.

Petition for Writ of Certiorari Filed March 30, 2009
Certiorari Granted June 29 2009

dic:3
Hastor 5Ø7AP6

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

Court of Appeals

Certified Transcript Of Audio-Taped Proceedings Before The Ninth Circuit Court Of Appeals In The Matter Of Teamsters Union Local 287, et. al. v. Granite Rock.....*JA-1 to JA-42.*

The Opinion Of The United States Court of Appeals For The Ninth Circuit, Granite Rock Co. v. Int'l Brotherhood Of Teamsters, Local 287, 546 F.3d 1169 (9th Cir. 2008) [Docket No. 385].....*JA-43 to JA-61.*

U.S. District Court

Complaint For Damages
[Docket No. 1].....*JA-62 to JA-69.*

First Amended Complaint For Injunctive Relief And Damages [Docket No. 5]..... *JA-70 to A-79.*

Transcript Of The July 26, 2004 TRO Hearing [Docket No. 21].....*JA-80 to JA-211.*

Judgment [Docket No. 12].....*JA-212 to JA-213.*

Plaintiff's Motion For A New Trial (Omitting Points And Authorities In Support Thereof
[Docket No. 16]..... *JA-214 to JA-216.*

Declaration Of Alan S. Levins In Support Of Plaintiff's Motion For A New Trial.
[Docket No. 19].....*JA-217 to JA-221.*

Order Granting New Trial
[Docket No. 41].....*JA-222 to JA-225.*

Order Denying Defendant's Motion For Judgment On The Pleadings, Or, In The Alternative, For A Stay Pending Arbitration
[Docket No. 57].....*JA-226 to JA-233.*

Order Granting Defendant's Motion For Partial Summary Judgment And Denying Defendant's Motion To Strike Plaintiff's Jury
Demand [Docket No. 83].....*JA-234 to JA-248.*

Second Amended Complaint For Damages And Injunctive Relief
[Docket No. 110].....*JA-249 to JA-258.*

Transcript Of Hearing On Motion To Dismiss Second Amended Complaint
[Docket No. 177].....*JA-259 to JA-300.*

Order Granting Motion To Dismiss With Leave To Amend [Docket No. 162].....*JA-301 to JA-303.*

Third Amended Complaint For Damages
[Docket No. 164].....*JA-304 to JA-321.*

Order Granting Defendant International Brotherhood Of Teamsters' Motion To Dismiss With Prejudice [Docket No. 192].....*JA-322 to JA-333.*

Interlocutory Judgment
[Docket No. 194].....*JA-334.*

Order Certifying Appeal Pursuant To
Rule 54(b) [Docket No. 212].....*JA-335 to JA-340.*

Amended Final Judgment And Certification Of Appealability [Docket No. 225].....*JA-341 to JA-342.*

Order Denying Labor Union's Motion To Compel Arbitration Of Bifurcated Issue Of Whether The Collective Bargaining Agreement Was Ratified [Docket No. 230].....*JA-343 to JA-362.*

Closing Instructions With Stipulated Facts [Docket No. 304] As Exhibit 1
[Docket No. 318].....*JA-363 to JA-377.*

Jury Verdict [Docket No. 321].....*JA-378 to JA-380.*

Order to Compel Arbitration
[Docket No. 323].....*JA-381 to JA-382.*

Additional Materials

Union Proposal for "Back To Work Agreement" (Fax Dated 07/03/04) [Trial Exhibit].....*JA-383 to JA-384.*

Finalized, Executed Collective Bargaining Agreement Between Granite Rock Company And Teamsters Local 287 (Effective 05/01/04 to 04/30/08) [Trial Exhibit].....*JA-385 to JA-396.*

Tentative Agreement Between Granite Rock Company And Teamsters Local 287
[Trial Exhibit].....*JA-397 to JA-448.*

IN THE UNITED STATES COURT. Of APPEALS
FOR THE NINTH CIRCUIT

TEAMSTERS UNION LOCAL 287, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Petitioner,

vs.

NATIONAL LABOR . . RELATIONS BOARD, Respondent.

GRANITE ROCK COMPANY, Respondent

No. 06-72964

TRANSCRIPT OF AUDIOTAPED PROCEEDINGS

Wednesday, July 1, 2009

Reported by:
CLAUDIA A. BETTUCCHI
CSR No. 12214
JOB No. 115654

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TEAMSTERS UNION LOCAL 287, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent.

GRANITE ROCK COMPANY, Respondent

No 06-72964

Transcript of Audiotaped Proceedings
transcribed in Martinez, California, on July 1, 2009
by CLAUDIA A. BETTUCCHI, Certified Shorthand
Reporter No. 12214.

--oOo--

[3] COURT PANEL MEMBER NO. 1: My notes indicate that the appellant, Granite Rock Company, will split their argument ten and ten. Is that right?

[3] MR. LEVINS: Yes, Your Honor.

[3] COURT PANEL MEMBER NO. 1: All right If you want to keep any time for rebuttal, its just keep an eye on the clock because we won't be—I don't have a whistle. All right?

[3] MR. LEVINS: Your Honor, could I just note one thing for the record? Granite Rock is the appellant in our case, and in another case they are actually an appellee.

[3] COURT PANEL MEMBER NO. 1: That's correct. That's the case as submitted on the briefs, right?

[3] MR. LEVINS: No.

[3] COURT PANEL MEMBER NO. 1: No. MR. LEVINS: No, it's in these—in these cases. Local 287 is the appellant in one case. The International, whom I represent, is the appellee so—COURT PANEL MEMBER NO. 1: Well—MR. LEVINS:—Granite Rock's not the appellant—is not the appellant in all matters.

[3] COURT PANEL MEMBER NO. 1: All right. We will—does that make a difference in the order in which they should be arguing?

[4] MR. LEVINS: It does to this extent, Your Honor: What we considered that—is that what Mr.

Mathiason and I will do is address the issues as appellant and then reserve time to address any issues that are raised by 287 as appellant; and then we would address those afterward, if that makes sense to the Court.

[4] COURT PANEL MEMBER NO. 1: Is that satisfactory?

[4] UNIDENTIFIED MALE SPEAKER: That's satisfactory.

[4] COURT PANEL MEMBER NO. 1: All right then we will proceed that way. All right.

[4] MR. LEVINS: May it please the Court. Alan Levins and Gary Mathiason for Granite Rock as the appellant and the appellee. This case is about an illegal strike by the Teamster defendants that was damaging to the company and damaging to the company's literally hundreds of employees who lost 11 weeks of paychecks because of the strike.

The strike was not for better wages; the strike was not for better benefits. Agreement on those issues had been reached in the morning of July 2, 2004.

What the strike was about was an attempt to get Granite Rock to sign a hold harmless agreement, aiding the Teamsters Unions harmless for their actions.

The strike was unlawful because it was in furtherance of the Union's demand that Granite Rock sign that agreement, a non-mandatory subject of bargaining, and it was unlawful because it was in violation of the party's Collective Bargaining

Agreement. The two ways that the Union violated the law were distinct and different.

We are here also, as you know, after a six-day trial in Federal Court where the jury unanimously determined that Granite Rock and the Union had reached an effective agreement on July 2nd, 2004. Local 287's attempts to overturn that verdict must be rejected. The verdict is supported by substantial evidence.

The Court's rulings below were correct, except for two that we will address at this point. First, the Court should not have ordered the damage phase of this trial to arbitration. The Union's conduct in the Court below was a repudiation and a waiver of the right to go to arbitration over the damage issue. Further, for judicial economy, that matter should be heard in Federal District Court.

Second, the Court dismissed Granite Rock's cross-complaint—

[6] COURT PANEL MEMBER NO. 2: Let me ask you, how is any economy in doing it now, since the jury didn't already decide it?

[6] MR. LEVINS: I'm sorry?

[6] COURT PANEL MEMBER NO. 2: Well, what's economy in doing it now?

[6] MR. LEVINS: The—it's intertwined with the cause of action against the International, Your Honor, so the—

[6] COURT PANEL MEMBER NO. 2: There is economy only if we find in your favor against the international, then?

[6] MR. LEVINS: That—the economy argument goes to that, yes.

[6] COURT PANEL MEMBER NO. 2: All right. I understand.

[6] MR. LEVINS: As we've discussed, I will address the first issue in our appeal. Mr. Mathiason will address the second. And then we'll reserve time to act as appellee to 287's arguments.

[6] COURT PANEL MEMBER NO. 3: Counsel—

[6] MR. LEVINS: Yes.

[6] COURT PANEL MEMBER NO. 3:—in your argument you might want to address what the various Circuits have done because at least my impression is that the great weight of authority is contrary to Granite Rock's making of a claim against the International, which was not party to the labor agreement.

[7] MR. LEVINS: I'm going to defer that to Mr. Mathiason. And we, of course, will address that and have addressed that in our briefs.

The Union repudiated the Collective Bargaining Agreement. It waived any right to arbitration with respect to damages. It is black-letter law that a party to a contract should not be able to repudiate that contract and then make a claim of rights under

that agreement, and yet that is exactly what the Union did in this case.

[7] COURT PANEL MEMBER NO. 1: How did it repudiate the contract?

[7] MR. LEVINS: It came into court, Your Honor, and said there is no contract. When we—when the Court dismissed the lawsuit early on in the proceedings, the Union never claimed the Court didn't have the right to do that because of an arbitration clause.

When we argued for a new motion and successfully did so, the Union never came forward and said. By the way, Your Honor, you should have considered the fact that you didn't have the jurisdiction to dismiss this case on the merits because you should have deferred to arbitration. It was only after the Court ruled in our favor on our motion for a new trial and only after the Union strike ended that the Union got religion, so to speak, with respect to arbitration.

The Union was also silent about arbitration during the pretrial conference, where it was decided that the District Court would determine issues of breach and issues of damages. It's fundamentally unfair for the Union to accept the Court's jurisdiction to decide the merits while that decision is favorable to the Union and then claim the Court cannot decide the merits of Granite Rock's damage claim because an arbitrator must. Black-letter law in a Ninth Circuit Cases require a finding of repudiation and waiver of the contractual right to arbitration.

We have also discussed in our brief the changing position that the Union had with respect to arbitration, and we've also discussed the prejudice that Granite Rock faced.

The issue of judicial economy arises with respect to the claim against the International, and at this point what I would like to do is have Mr. Mathiason address that issue.

[8] COURT PANEL MEMBER NO. 1: All right.

[9] MR. MATHIASON: May it please the Court. My name is Gary Mathiason. I'm representing Granite Rock on the IDT appeal. They were dismissed from the case, and we are appealing that decision.

23 years ago I came before the Ninth Circuit, a different panel, and argued the Lumber Worker's case, which is the primary authority cited by the other side. This case actually is the foundation for where we are today. In that case the Court rejected a claim on the grounds that there was no existing contract that had been breached and made that a requirement.

This is effectively what Painters & Decorating Contractors lays out as a foundation for 301 jurisdiction; namely, a breach of a Collective Bargaining Agreement doesn't have to be by the party to the Collective Bargaining Agreement. We've got long-established Supreme Court authority with regard to the fact that it doesn't have to be a signatory.

[9] COURT PANEL MEMBER NO. 1: The statute reads violation of contracts.

[9] MR. MATHIASON: Correct

[9] COURT PANEL MEMBER NO. 1: Right. Hasn't that been interpreted in this Circuit as meaning breach of contracts?

[9] MR. MATHIASON: Correct.

[10] COURT PANEL MEMBER NO. 1: How can a nonparty breach a contract?

[9] MR. MATHIASON: By inducing another party—

[9] COURT PANEL MEMBER NO. 1: that's a tort. That's

[9] MR. MATHIASON: Label—

[9] COURT PANEL MEMBER NO. 1: He' s not a party to the contract. You can—you can intentionally interfere with the performance of a contract without being a party to the contract. But you cannot breach a contract, at least as I remember my contract law, unless you are an obligor.

[9] MR. MATHIASON: There is extensive Supreme Court authority on the fact you don't have to be a signatory.

[9] COURT PANEL MEMBER NO. 1: No, but you have to be a party. You have to be a party to the contract.

[9] MR. MATHIASON: No.

[9] COURT PANEL MEMBER NO. 1: You have to be an obli—

[9] MR. MATHIASON: You don't have to be a party to the contract.

[9] COURT PANEL MEMBER NO. 1: You don't have to be an obligor; you don't have to be a party to the contract? What's the extent of Supreme Court authority that tells us that?

[10] MR. MATHIASON: Well, it starts right at Lincoln Mills. It goes to Allis Chalmers, and we—

[10] COURT PANEL MEMBER NO. 1: Lincoln Mills.

[10] MR. MATHIASON: Allis Chalmers.

[10] COURT PANEL MEMBER NO. 1: Allis Chalmers. Those are very familiar names.

[10] MR. MATHIASON: And we provide several cases in the brief where nonsignatory status still allows the individuals to come forward. The classic case is an employee. An employee doesn't get a benefit under a Collective Bargaining Agreement The employee is not a party to the Collective Bargaining Agreement.

[10] COURT PANEL MEMBER NO. 1: He's a third-party beneficiary.

[10] MR. MATHIASON: As is the circumstance here.

[10] COURT PANEL MEMBER NO. 1: The International is a third-party beneficiary?

[10] MR. MATHIASON: The International effectively acted and forced this breach of a Collective Bargaining Agreement—

[10] COURT PANEL MEMBER NO. 1: I'm not asking about—

[10] MR. MATHIASON:—for its own benefit. For its own benefit. Because during this—the reason this happened is that the International wanted immunity from litigation. Once the contract was done, all of its economic power was gone. This International is intertwined in the strike, intertwined in the issues, has its own International representative involved.

[12] COURT PANEL MEMBER NO. 2: Who was going to get immunity if the hold harmless was signed?

[12] MR. MATHIASON: The International and the Locals.

[12] COURT PANEL MEMBER NO. 2: Yeah, and the Local and the people who participated in the strike, right?

[12] MR. MATHIASON: Potentially the people who participated in the strike, but they wouldn't have liability in any event. It would be the International and the locals.

[12] COURT PANEL MEMBER NO. 2: All right now let me ask you this: you've taken a strong position here that Supreme Court authority dictates the result. Does that mean that all of those other Circuit decisions are contrary to the Supreme Court—

[12] MR. MATHIASON: Not at all. The other Circuit Courts—and this replies to the question raised, which is the overwhelming authority. If you go into each Circuit--and we did that in our brief—and you

look at the three factors of this case, first, a very close relationship between the International and the Local, close relationship being the first test; then the induction or inducing of a breach causing the breach to happen, the second factor; and then, for a direct benefit, the third factor. This is the three part test.

And you take that and transplant it, across the cases, you find that a majority of the Circuits would recognize it. What they don't do—what they don't do is they don't call it necessarily tortious interference because, once you get through the gateway of having a Collective Bargaining Agreement that's been breached, then there is a common law to be fashioned by the Federal Courts.

And that could be a hybrid. It could be just another person or entity that's liable for the breach, since they caused it. It could be put into the category of a tort or any number of different characterizations. Those characterizations start disappearing in their significance, and what you're looking at is fundamental injustice.

If this action is not followed, what we face is a circumstance where an international union that has financial control—and that's what we've alleged—over its Local is operating as the agent, as the principal driving force, can go into a labor dispute, have it—a contract reached by the Local, ratified by the employees and say, forget it, we don't care about it because we want some additional concessions, have the power to do that with no reach under Section 301—

[14] COURT PANEL MEMBER NO. 3: Well, wouldn't the Interna—excuse me, Counsel.

[14] MR. MATHIASON: Yes.

[14] COURT PANEL MEMBER NO. 3: Wouldn't the International then potentially have some other liability? But the issue that we have is do they have liability under the LMRA?

[14] MR. MATHIASON: They have no liability if they—if they can't be reached under 301. Under 301 they—we argue they do have liability. If not, 301 preempts any State cause of action. In California we had a cause of action that would work up until 1947. Congress took it away, but that made sense for a consistent body of Federal law.

The only other possible way, Your Honors, that you could try to reach them is through the National Labor Relations Board. And it's very interesting to note carefully what the opposing party in their brief placed. They primarily relied on the NLRB case decided in 1992, Paperworkers International, and then that same case on appeal.

If you read that case in detail, it has nothing, nothing to do with our facts. This is an International that was the bargaining representative. They signed the contract, and they were effectively dealing with a precontract situation. Once you get to a contract being formed, then the post-contract conduct is really intended to be regulated by 301.

It would be a travesty. And I offer to you the Internationals that have participated in the amicus briefs are looking at this situation as to whether an International could be completely free of liability.

I have waited two decades to bring this case back to the Court because we don't see these facts very often. But if we give the International immunity, I think the far greater danger would be more conduct of this type encouraged by an International that couldn't be reached under any possible legal claim.

[15] COURT PANEL MEMBER NO. 1: Thank you very much. You are going to keep us—

[15] COURT PANEL MEMBER NO. 3: So what is your—what's your precedent that you rely on to say a claim against the International, if it's a nonparty, that would be preempted?

[15] MR. MATHIASON: It would be preempted? Well, there's a whole series of cases. I can look up a couple directly, but that is covered in several different—

[16] COURT PANEL MEMBER NO. 3: There is certainly—there is certainly preemption of a claim against a party to the labor agreement that's, you know, arguably for conduct arguably within the scope of the labor laws. But what case says you'd have preemption on a claim against the International when it wasn't a party?

[16] MR. MATHIASON: Yes, I'll give you that cite. We have it in our brief. And also, if you think about it logically, if the whole issue of the breach of the contract, the interpretation of the no-strike clause, 417 words were subject to litigation under—by Local 287 in Federal Court and by an International in State Court, you'd have inconsistent outcomes, potentially.

And that's exactly what the Landrum-Griffin Act was passed to avoid, was the ability to bring it into a Federal forum. And that's what we're requesting here. I will in our reserve time respond. Thank you.

[16] COURT PANEL MEMBER NO. 1: Don't forget that case that you mentioned.

[16] MR. NUSSBAUM: May it please the Court.

[16] COURT PANEL MEMBER NO. 1: Mr. Nussbaum.

[16] MR. NUSSBAUM: Yes, I am Peter Nussbaum, and I represent the Teamsters International. And I will try, in my argument, to answer some of the questions that all of you posed to Mr. Mathiason. The sole issue in our case is whether Granite Rock can bring a claim for tortious interference against the International under Section 301.

Granite Rock is asking this court to engage in what the Fourth Circuit in Coventry Coal called judicial inventiveness when they refused to rule that such a tort can be brought under 301. Doing what Granite Rock is urging is not only contrary to the language of 301 and the legislative history but would greatly expand the jurisdiction of this court, which I'll talk about in a moment.

The answer, as you have indicated, Judge Gould—and you are absolutely right—the law in virtually every other Circuit is against what Granite Rock is arguing for. They attempt to say how they think the Circuits would now rule on that issue, but the decisions are there. And except for the third Circuit,

they are unanimous that you cannot do it, those Circuits that have considered it.

And the reason that they have follow · that you cannot bring a claim under 301 for tortious interference is because the claim under 301 must be based on a breach of duties that are found within the contract. Section 301 talks about violations of contract. Therefore, to have a 301 claim against a party, it must arise from a violation of contract.

That is not what Granite Rock's claim is about. Their claim is tortious interference. And as they state, allege in their complaint, their complaint against the International is that we induced somebody else to violate the contract.

Now, that gives them the right to bring a 301 action against Local 287, but it does not give them the right to bring an action against us, because our claim of tortious interference, the claim that's being brought against us, inducement, that does not involve a violation of the terms of the contract.

[18] COURT PANEL MEMBER NO. 2: What's your view about the ability of Granite Rock to bring a claim against you in State Court for a tort?

[18] MR. NUSSBAUM: They cannot do it. And this may seem like an unusual situation, but it's not as uncommon as—

[18] COURT PANEL MEMBER NO. 2: This seems a lot like ERISA to me.

[18] MR. NUSSBAUM: Yes, you are exactly right.

[18] COURT PANEL MEMBER NO. 2: All right.

[19] MR. NUSSBAUM: It's not an uncommon situation. When Congress decides to regulate an area, as they have done with pensions, they have done with copyright, they have done with labor law—

[19] COURT PANEL MEMBER NO. 2: I understand your position.

[19] MR. NUSSBAUM:—they set up a scheme. And very often in doing that, there are torts that existed under State law, under common law, that are eliminated. Congress has struck a balance, and that's (inaudible) in this particular case.

I should point out that at the same time that Section 301 was being enacted, in the same statute Congress actually did create a very limited tort right in Section 303 for exactly what they are talking about, although the facts of their case wouldn't fall under it. And that's for business interference when you are engaging in secondary conduct. That there is not only an unfair labor practice under Section 8 before the Labor Relations Act but also a cause of action under Section 303, which they can't blame—couldn't bring here because it is not—

[19] COURT PANEL MEMBER NO. 1: So Mr. Nussbaum, let's take a hypothetical. Let's suppose that a gang of thugs on an eastern seaboard—Reminiscent of a movie with Marlon Brando, right?

[20] MR. NUSSBAUM: I'm old enough to remember it.

[20] COURT PANEL MEMBER NO. 1: Fine.

[20] MR. NUSSBAUM: And I was living in New York.

[20] COURT PANEL MEMBER NO. 1: —cause a union to breach its contract. What you're saying is, under 301 the Union can be sued—the Local Union can be sued, but the gang of thugs can't be sued under 301 because they are not a party to the contract and they can't be sued in State Court because of preemption.

[20] MR. NUSSBAUM: Well, I'm—

[20] COURT PANEL MEMBER NO. 1: So the gang of thugs walks.

[20] MR. NUSSBAUM: Now, I'm not—I'm saying—

[20] COURT PANEL MEMBER NO. 1: What's the difference between that and the allegations of the complaint here as against the International Brotherhood of Teamsters?

[20] MR. NUSSBAUM: Well, there is a very critical one, and we point it out in our brief. There is no allegation that the International engaged in violence. And that is not the case—

[20] COURT PANEL MEMBER NO. 1: No, no. None of the thugs—they said, We're not going to engage in violence; we're going to threaten violence. That's all. Were not going to engage violence; we're going to threaten violence.

[21] MR. NUSSBAUM: That is—that would be—that would not give them a claim under Section 301.

[21] COURT PANEL MEMBER NO. 1: Well, what you're saying is that in that situation and in this, because the IBT is not a signatory—

[21] MR. NUSSBAUM: No, no. I want to straight—

[21] COURT PANEL MEMBER NO. 1: —or not a party—

[21] MR. NUSSBAUM: No, I need to straighten that out, and I want to address a point that Judge Gould raised. The issue doesn't depend on whether the IBT is a signatory. Some courts have used that analysis. That's not the proper analysis. The analysis—because there clearly are cases where a third party . be a plaintiff or a third party can be a defendant a 301 case. That's not the critical issue.

As this Court has laid out the standard in Painting and Decorating in Majestic Housing and finally in Lumber Workers, there's a two-prong test for 301. There has to be a colorable claim of a breach of contract by the defendant whom you are trying to sue, not some other defendant. But the second part of it is that the case has to be focused on—the claim has to be focused on and resolved by the Collective Bargaining Agreement. That's the standard. You don't have to be a signatory.

What's missing in this case is that their claim against the International is not focused on and is not governed by the terms of the Collective Bargaining Agreement. Now, they argue, well, the essence of our case is an interpretation of the Collective Bargaining Agreement. That's the essence of their case against Local 287, Breach of Contract. That is not the essence of their claim against us.

The essence of their claim against us is we induced somebody else to breach the contract. That is not a claim for violation of contract. That is, as Judge Gould—or Judge Bea, as you pointed out, that is a tort claim. And I think it's very clear from the wording of the statute, which talks about violations of contract, there's no way to shoehorn inducing someone else to breach a contract into those words Violation of Contract.

What Congress was attempting to do in Section 301—and we've cited all the legislative history to you—was to make contracts enforceable. Make them enforceable about the terms and conditions of the contract, about the promises the parties made in their contracts. That is what 301 did.

[23] COURT PANEL MEMBER NO. 1: Okay.

[23] MR. NUSSBAUM: It wasn't intended to do any more.

[23] COURT PANEL MEMBER NO. 1: You are coming to the end of your time, and Mr. Bonsall has 13 minutes, right?

[23] MR. NUSSBAUM: Mine, sir, was yellow—well, I guess I'm just about done. You're right. There it is.

[23] COURT PANEL MEMBER NO. 1: Okay.

[23] MR. NUSSBAUM: Thank you very much, Your Honors.

[23] COURT PANEL MEMBER NO. 1: Thank you.

[23] MR. BONSALL: May it please the Court. My name is Robert Bonsall. I'm an attorney with the law

firm of Beeson, Tayer & Bodine, representing Teamsters Local 287 in this case.

In the time allotted, I'll try to address three issues: First, whether Granite Rock should be collaterally estopped from arguing the date of contract ratification; second, whether the issue of contract formation should have been referred to arbitration by the Court; and finally, if the Court properly retained jurisdiction over the contract formation issue, whether that matter should have been resolved by the trial court rather than submitting the issue to a jury.

First, collateral estoppel. There is something patently unfair about the situation where the Union now is dealing with two diametrically opposed and inconsistent factual conclusions regarding the date of ratification of the Collective Bargaining Agreement. The doctrine of collateral estoppel or issue preclusion is specifically designed to prevent such injustices by limiting the number of times a defendant may be called upon to defend itself on a particular factual pattern—excuse me—a factual issue.

[24] COURT PANEL MEMBER NO. 2: What is it that called upon you to defend that in the NLRB proceeding?

[24] MR. BONSALL: Excuse me, Your Honor?

[24] COURT PANEL MEMBER NO. 2: What is it that called upon you to defend that position? It looks to me, when you look at what was decided originally, what you are relying upon for collateral estoppel or issue preclusion isn't there. There was no real

argument that it was July 2nd instead of August 2nd. Can you point to something that makes it clear that issue was actually litigated?

[24] MR. BONSALL: Yes. The decision handed down by the Administrative Law Judge and that was adopted by the Board specifically indicates on no less than four separate references in the decision itself that Granite Rock had contended before the Administrative Law Judge that in fact the Collective Bargaining Agreement was in fact ratified by the members on July 2nd.

"Q: For example, on page 9 of the decision the Administrative Law Judge said as follows: Quote, the employer contends that the employees did in fact ratify the contract on the morning of July 2nd. However, the record does not support such a finding.

[25] COURT PANEL MEMBER NO. 2: But is that merely background or is that something that was actually litigated? My impression is that it was not litigated, that was not the theory that was used in pursuing the claim. The theory that was used is that it should have been ratified, the vote should have been taken and it wasn't.

[25] MR. BONSALL: Yes, I think the Union's response to that would be as follows: That the question of whether a matter was actually litigated is not dependent upon how well a party exercises its opportunity to litigate; rather, there is a question of whether Granite Rock had a full and fair opportunity to present its case.

The rules and regulations of the National Labor Relations Board specifically indicate that, as one

who filed a charge, Granite Rock was a party. That's undisputed. But Granite Rock will allege that it was merely a witness, a bystander to the proceeding. The facts do not bear that out and neither do the regulations of the Board.

Specifically, as a party Granite Rock was not only entitled to appear, which it did, but they were entitled to call witnesses and introduce evidence. In addition, they were entitled to cross-examine all witnesses. They were entitled to make oral arguments and submit briefs. They were even entitled to propose findings of fact and conclusions of law as well as proposing alternative remedies.

We believe that, if the Court looks at the record, it's quite clear that Granite Rock did all of these things. So we really believe that they were not just a party in name but a party in fact at that proceeding.

The trial Court rejected collateral estoppel for two reasons: One, that it wasn't actually litigated. And I believe that the record indicates that the date of ratification was truly litigated. The other point that the trial court raised as a basis for denying its application for collateral estoppel was that Granite Rock was not in privity with the General Counsel.

We believe that the trial court perhaps was at a disadvantage because it decided that issue one month before this court handed down its decision in Reyn's Pasta Bella versus Visa. And I believe Judge Bea, you were on that panel. That court, that decision specifically says that collateral estoppel being asserted against a party, the element is met if in fact the person was a party in the prior proceeding or in privity. The trial court seemed—

[27] COURT PANEL MEMBER NO. 1: That was not an NLRB case.

[27] MR. BONSALL: Excuse me?

[27] COURT PANEL MEMBER NO. 1: That was not an NLRB case. The Pasta case was a consumers' fraud case.

[27] MR. BONSALL: Well, I think that that is correct. It was not an NLRB case. I believe the principles of Reyn's Pasta nevertheless would apply.

The Union was asserting that Granite Rock was a party to the proceeding, and the trial Court found that they weren't in privity. We believe that Reyn's stands for the proposition that you can be one or the other, you don't need to be both. You do not need to be a party and in privity.

[28] COURT PANEL MEMBER NO. 2: Well, assuming that's so, though, are you in privity if the person with whom you are supposed to be in privity refuses to make your argument?

[28] MR. BONSALL: The General Counsel certainly had a theory of the case, and we don't deny for a moment that Granite Rock had a different theory.

[28] COURT PANEL MEMBER NO. 2: I mean, you might prevail on the argument that Granite Rock was a party, but isn't it a harder argument to make that Granite Rock was in privity with the General Counsel who wouldn't make their argument?

[28] MR. BONSALL: No, I think you are correct, Your Honor. It would be much more difficult if we

had to rely upon the fact that Granite Rock was in privity. We don't believe that they had exactly the same view of either the facts or the theory of the case. But they were a party. They—

[28] COURT PANEL MEMBER NO. 3: (Inaudible.)

[28] MR. BONSALL: Yes, Your Honor.

[28] COURT PANEL MEMBER NO. 3: Counsel, my question is, you know, if we say or if we decide that contract formation should have gone to the arbitrator, then wouldn't we not—we would not reach this collateral estoppel.

[29] MR. BONSALL: That's correct, Your Honor. I believe that's the case.

[29] COURT PANEL MEMBER NO. 3: So why shouldn't we talk about that issue first? I mean, if that issue eliminates this one, maybe you should make your argument on that.

[29] MR. BONSALL: That's a perfect segue. I will take Your Honor's advice. Turning to the contract formation question, Granite Rock's anomalous prosecution of its case against the Union has created what we would describe as an absurd situation. There is no doubt that Granite Rock's claim against the Union is that the Local violated the No Strike Clause of the Collective Bargaining Agreement. And there is no question that the Collective Bargaining Agreement contains a broad arbitration clause.

Rather than—well, let me say it this way: the Union believes that what the Union—excuse me—what Granite Rock should have done and could have done

in this case was to file a petition in Federal Court seeking to compel arbitration. If they had done that, the Union would have raised its affirmative defense that the contract was not ratified on July 2nd and therefore there was no breach of the No Strike Clause because the contract wasn't in effect.

Instead, what Granite Rock has done in this case improperly is to file a breach of contract action in Federal Court, claiming damages against the Union and using the Union's affirmative defense as a way to argue that the entire matter should be submitted to a jury. We believe that the courts and this court has developed an analytical framework to deal with such absurd situations. Specifically—

[30] COURT PANEL MEMBER NO. 2: (Inaudible) has gone too fast for me. Suppose that Granite Rock had done exactly what you suggested.

[30] MR. BONSALL: Yes.

[30] COURT PANEL MEMBER NO. 2: Where would the question of the existence of the contract been decided then?

[30] MR. BONSALL: Before the arbitrator.

[30] COURT PANEL MEMBER NO. 2: Even though you disputed there was such a contract?

[30] MR. BONSALL: Yes. We believe that the fact pattern would be analytically on all fours with the case of Teledyne versus Kone Corporation. In that particular case the parties, Teledyne and Kone, were seeking to negotiate an exclusive distribution agreement.

The parties, after the negotiations, developed a document which was entitled Draft to be finalized by the Kone legal department, and that was the only document that the parties created. Subsequently, Teledyne brought a breach of contract action against Kone. And Kone raised two defenses, which are remarkably similar to the defenses that the Union raised in this case.

[31] COURT PANEL MEMBER NO. 2: Well, how is it different, though, from the hypothetical case or the other case, where there is no sig— I mean, there was no agreement? Jones sues Smith and says the contract exists, and Smith says I never agreed to that, I didn't sign it. Isn't that the same thing you're saying here? The Union is saying, no, no we never had an agreement.

[31] MR. BONSALL: No, I think what Your Honor is referring to is that narrow exception which was created by Three Valleys.

[31] COURT PANEL MEMBER NO. 2: Yeah, but why doesn't that apply here if you're saying there is no contract?

[31] MR. BONSALL: Because if the Court looks closely at the Teledyne case will find that the plaintiff, Granite Rock, was relying upon a Collective Bargaining Agreement and was not challenging it. That Collective Bargaining Agreement concededly had a very broad arbitration provision. It was the defendant who raised a challenge to the contract as a whole, not challenging the arbitration provision—

[32] COURT PANEL MEMBER NO. 2: No, no, I understand that. But why is that different from the

hypothetical where Smith simply says there is no contract? In your case the Union says there is no contract.

[32] MR. BONSALL: Because Granite Rock is the party seeking to enforce—

[32] COURT PANEL MEMBER NO. 2: So it makes a difference as to which party says it, is that what you're saying? We should draw a distinction between Plaintiff or Defendant as to whether or not the issue is decided by a court or decided by an arbitrator? That doesn't make much sense to me.

[32] MR. BONSALL: Well, it's not which defendant—plaintiff or defendant. Rather, if the Court looks to the Three Valleys case, it refused to arbitrate the issue because the plaintiff in that case, a group of public entities that had sued E.F. Hutton, was claiming that the person who signed the investment contracts didn't have the authority to bind them. And the Court said, We can't send that matter to arbitration. Why? Because, quote, a party who contests the making of a contract containing an arbitration provision cannot be compelled to arbitrate.

[33] COURT PANEL MEMBER NO. 2: I know what it says. But why should we treat it differently because it's the other party that contests the legitimacy of the contract? I can't—I can't get my hands around why that makes a difference.

[33] MR. BONSALL: All I can say is that I believe that the Three Valleys Court cited approvingly of the decision handed down two years earlier in the Teledyne case. Specifically, the Three Valleys Court

said the fact pattern in that instance was quite different than Teledyne. In Teledyne the plaintiff had asserted the validity of the underlying contract and the plaintiff had not challenged the arbitration provision; and therefore, the court in Three Valleys, which we believe was creating a narrow exception to the Nagrampa paradigm of contracts that challenge—challenges to contracts based on the entire contract versus challenges to the arbitration provision, the Court specifically said that the plaintiff in Teledyne had no grounds to repudiate the agreement and that, to allow the plaintiff to circumvent the arbitration provision by bringing its claim in Federal Court, created an absurd result.

We believe that Teledyne, Three Valleys and Nagrampa all are quite consistent and should be read to—by this Court to reach one conclusion, and that is the party who is relying upon the contract, whose very claims depend upon the contract and that same party not contesting the arbitration provision, should not be allowed to use the defendant's claim that there might be a challenge to the agreement as a whole as a basis to circumvent its agreement to arbitrate.

[34] COURT PANEL MEMBER NO. 2: Okay. So it doesn't make a—it does make a difference whether it's the plaintiff or the defendant. I mean, that's what you're telling me.

[34] MR. BONSALL: Well, Granite Rock, I think, would have this Court believe that it's always the defendant who gets to make that decision, and we don't believe that that's correct. We think that what the narrow exception in Three Valleys stands for is that the Court may look to whether a party, plaintiff

or defendant, is challenging the very existence of the contract.

[34] COURT PANEL MEMBER NO. 2: But didn't your client challenge the very existence of the contract?

[34] MR. BONSALL: Correct, but we were not being compelled to arbitrate. If the Union, which was challenging the contract, had said in this case, We refuse to go to arbitration, we would be in the situation described by Three Valleys. But we're asking to go to arbitration. We're asking to abide by the agreement, which puts us four square with the Teledyne case.

[35] COURT PANEL MEMBER NO. 1: Which you deny—an agreement you deny was executed.

[35] MR. BONSALL: No. In fact, the agreement was executed.

[35] COURT PANEL MEMBER NO. 1: Well, I mean, it wasn't executed on July the 2nd.

[35] MR. BONSALL: No. Factually, we contend that the agreement was not executed on July 2nd.

[35] COURT PANEL MEMBER NO. 1: Right, okay.

[35] MR. BONSALL: But we would refer—because there is a certain fact which I think is important in this case. The parties have a dispute about when it was ratified, but there is no dispute about the terms of the agreement, its beginning date and end date.

The record indicates—and I believe that this is in the excerpts of record, page 111—that the Collective

Bargaining Agreement was made effective by both Granite Rock and the Union on May 1st of 2004, which predates the period that the employer claims there was a breach of the No Strike Clause.

This fact wasn't even addressed by the NLRB, and it wasn't addressed by the Court below. We have a contract that covers the entire period, and yet the Court seemed to ignore that. This was clearly something that should have been arbitrated.

We would also contend that contract formation is analytically no different than contract termination. And this court in the Camping Construction Case, the Ninth Circuit has held that contract termination issues about when a contract expires or when somebody, one party, takes steps to either repudiate or terminate it shouldn't be reserved for the Court but should be sent to arbitration as long as the contract has an arbitration clause in it.

Analytically, there is no basis to distinguish contract formation issues than—different than contract termination issues. Both should be referred to the arbitrator, unless a party is challenging the arbitration clause itself. Then that would fall within the Nagrampa exception first enunciated by Prima Paint.

[36] COURT PANEL MEMBER NO. 1: Mr. Bonsall, we've kept you longer than your time. It's not your fault. Thank you.

[36] MR. BONSALL: Thank you very much, Your Honor.

[36] COURT PANEL MEMBER NO. 1: I think, Mr. Levins, we'd like to hear either from you or from Mr. Mathiason on this last issue, why this matter shouldn't be arbitrated, why the Trial Court did not err in granting summary judgment on that issue.

[37] MR. LEVINS: The answer is simple. Granite Rock never agreed to arbitrate the issue of contract formation. The issue of contract formation is one, as Judge Sedwick has pointed out, that the courts for close to 50 years now have said is a judicial determination. We do not let arbitrators determine their own jurisdiction.

[37] COURT PANEL MEMBER NO. 1: But wait a minute. Didn't Granite Rock allege in its complaint that there was a contract?

[37] MR.. LEVINS: Yes, and the Union denied it. The Union said, We do not have a contract.

[37] COURT PANEL MEMBER NO. 1: Right. But when you alleged that it was a contract, you didn't allege, comma, except we never agreed to the arbitration, comma. You said you alleged the contract was formed that had an arbitration clause in it.

[37] MR. LEVINS: Yes, but the arbitration clause states that we will arbitrate issues that arise under the agreement. That suggests—more than suggests. That means that we have to have an agreement.

AT&T Technologies, John Wiley, Livingston & Sons, cases over 50 years in labor law make it absolutely clear that, when the issue is one of contract formation, then an arbitrator decides that. The

Union is mixing up those cases with cases where there already is a contract and one party or the other is saying, yes, we signed a contract. And that includes Teledyne. We signed a contract; however, one party or the other suggests for some reason that there was fraud in the inducement or the contract is voidable or what have you.

There is not one case that the Union cited to suggest that an arbitrator makes this determination where the parties disagree about whether a contract was formed. The cases that they rely on are the cases where the contract was formed and the other—and one party—

[38] COURT PANEL MEMBER NO. 1 What you are arguing is that your allegation that a contract had been arrived at on July the 2nd, 2004, is as to a contract which has an arbitration clause that only allows the arbitration of certain issues arising under the contract, one of which is not contract formation.

[38] MR. LEVINS: That's right. If you look at First Options, a recent Supreme Court case Judge Breyer made it clear, a party does not give up the right to determine contract formation unless there is unequivocal and express language to that effect.

[39] COURT PANEL MEMBER NO. 1: And what—Justice Breyer in which case?

[39] MR. LEVINS: First Options.

[39] COURT PANEL MEMBER NO. 1: Uh-huh.

[39] MR. LEVINS: And I say, this is 50 years of labor law, and we never agreed to have contract formation

be the—be determined by an arbitrator. And the cases cited by the Union do not support their position in that regard. The cases Three Valleys and the other cases make it clear, the issue in those cases yes, there was a contract, but one party says, for one reason or another, it wasn't enforceable.

Let me go back to—

[39] COURT PANEL MEMBER NO. 3: Counsel, what about the language in Nagrampa and in Prima Paint? It seems to distinguish between challenging the contract as a whole or just challenging the arbitration provision.

[39] MR. LEVINS: In Nagrampa, as you well know, the issue was directed toward the arbitration provision. Ms. Nagrampa said she was fraudulently induced to agreeing to arbitration. If anything, Nagrampa supports our position because the Court said, where that kind of an allegation is made, it's up to the Court to determine the issue.

In Prima Paint there was no disagreement there was a contract, but one of the parties said it was voidable, for whatever reason. I think it was fraud in the inducement. And the Court said, You have agreed—you both parties have agreed that there is a contract. Once you agree that there is a contract, you have agreed to have the arbitrator make the decision. Very, very different case from our case. Very different case from Sanvick, which we cited.

Let me address the collateral estoppel issue in the remaining ten seconds that I have. We did not—we did not litigate that case, as Judge- that issue, as Judge Sedwick suggested. The—in fact, what

happened was General Counsel, the master of the complaint, alleged that the ratification didn't occur on July 2nd and the Union agreed with that. There was no litigation. You go through the entire record, there is no litigation on that issue.

[40] COURT PANEL MEMBER NO. 2: What about the suggestion that you presented evidence and made arguments to the contrary?

[40] MR. LEVINS: It's not true. It's absolutely not true. We stated at the outset that we—

[40] COURT PANEL MEMBER NO. 2: Well, I know you asked to reserve your right. But during the course of the proceeding, did you do those things he said?

[41] MR. LEVINS: No. Did not; could not. Could not. The Administrative Law Judge made it clear at the outset that we were bound, for the purpose of that hearing, to the allegations of the complaint. The Administrative Law Judge would have held me in contempt if I tried to do that. I did not have the opportunity to do that whatsoever. It was not litigated, and I did not have the opportunity to do that.

I'd like to allow Mr. Mathiason to address a couple of the points that Mr. Nussbaum—

[41] COURT PANEL MEMBER NO. 1: We'll give you two minutes.

[41] MR. MATHIASON: Yeah, what I would like to do is just respond to the request of the Court for case citations.

[41] COURT PANEL MEMBER NO. Right.

[41] MR. MATHIASON: And under the issue of nonsignatory status, three Supreme Court decisions, in particular: Smith versus Evening News, Wooddell and Heins, all three are cited in the brief.

[41] COURT PANEL MEMBER NO. 1: What page of the brief?

[41] MR. MATHIASON: Page—

[41] UNIDENTIFIED MALE SPEAKER: 22.

[42] MR. MATHIASON: Yeah, 22. And then with regard to the 301 preemption—

[42] COURT PANEL MEMBER NO. 1: (Inaudible.)

[42] MR. MATHIASON:—I think we cited on page 20 Lingle versus Norge. This is again 301 preemption in this area is well defined. This court, Ninth Circuit July 2nd, 2008, after the briefs were submitted in Rachford, R-A-C-H-F-O-R-D, has a full discussion of 301 preemption.

Opposing counsel confirmed the understanding we have. You don't have 301 jurisdiction if the Court so finds that we can't bring it. You don't have—you have 301 preemption of the entire area. And what it comes back to is that we never get a chance to litigate, from the standpoint of the International, the breach of the No Strike Clause, 417 words that are going to require interpretation. And that is the essence of the breach that was induced and caused by the International. No remedy through the NLRB.

It seems to put the Taft Hartley Act upside down, legislative intent upside down and fundamentally just unfair if somebody can act with this kind of malice as we've alleged. Maybe the trial won't prove it; we think we can prove it, that you can maliciously go in, control the events of the Local, cause the breach and then be able to rescind or pull back your presence and hide behind the Local.

This is a perfect area to do what the Supreme Court has talked about in Lincoln Mills, Allis Chalmers, and that is form a common law of 301 that would define under these narrow circumstances reaching the International.

[43] COURT PANEL MEMBER NO. 1: Thank you very much.

[43] MR. NUSSBAUM: Excuse me, Your Honor. May I respond to something that was just said? Because it went beyond just citing cases.

[43] COURT PANEL MEMBER NO. 1: All right. We'll give you a minute to do so.

[43] MR. NUSSBAUM: Yes, thank you. I just want to emphasize one thing in this case. This is not a situation of Granite Rock saying, gee, we had this strike against us and we suffered all this damages and we have no remedy. They do have a remedy. They are exercising their remedy against the party who allegedly breached the contract.

What they are asking you to do is to create a different remedy, a remedy that was never meant by Congress, a remedy that has been denied in virtually every Circuit and a remedy that would greatly

expand your jurisdiction because most of those cases in the other Circuits, where they denied bringing this type of claim, were actually brought by Unions. It's not just employers who would bring these case; it's unions who would bring it. It would be adding in punitive damages. It would be a sea change in what the law is under Section 301. Thank you.

[44] COURT PANEL MEMBER NO. 1: Thank you, sir. The case of Granite Rock versus International Brotherhood of Teamsters is submitted. And I want to thank all counsel for their presentation. It was very instructive and has given us a great deal to think about. Thank you very much.

I, the undersigned, a Certified Shorthand Reporter of the State of California, do hereby certify:

That the foregoing audio recording was taken down by me using machine shorthand which was thereafter transcribed under my direction; further, that the foregoing is an accurate transcription thereof.

I further certify that I am neither financially interested in the action nor a relative or employee of any attorney or party to this action.

IN WITNESS WHEREOF, I have this date subscribe my name.

Dated: _____

/s/
CLAUDIA A. BETTUCCHI
CSRNO: 12214

United States Court of Appeals,
Ninth Circuit.

GRANITE ROCK COMPANY, Plaintiff-Appellant,
v.
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, FREIGHT CONSTRUCTION, GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL 287 (AFL-CIO); International Brotherhood of Teamsters, Defendants-Appellees
Granite Rock Company, Plaintiff-Appellee,
v.
International Brotherhood of Teamsters, Freight Construction, General Drivers, Warehousemen & Helpers, Local 287 (AFL-CIO), Defendants-Appellants,
and
International Brotherhood of Teamsters, Defendant.
Granite Rock Company, Plaintiff-Appellant,
v.
International Brotherhood of Teamsters, Freight Construction, General Drivers, Warehousemen & Helpers, Local 287 (AFL-CIO); International Brotherhood of Teamsters, Defendants-Appellees.

Nos. 07-15040, 07-16142, 07-16236.

Filed Oct. 22, 2008.

Appeal from the United States District Court for the Northern District of California; James Ware, District Judge, Presiding. D.C. No. CV-04-02767-JW.

1171 Before: RONALD M. GOULD and CARLOS T. BEA, Circuit Judges, and JAMES W. SEDWICK, District Judge.

GOULD, Circuit Judge:

Granite Rock Company ("Granite Rock") sued International Brotherhood of Teamsters, Local 287 ("Local 287") and International Brotherhood of Teamsters ("IBT") under section 301(a) of the Labor Management Relations Act ("LMRA") with claims relating to a collective bargaining agreement. Granite Rock seeks remedies against Local 287 for breach of the collective bargaining agreement, and against IBT for tortious interference with the collective bargaining agreement between Granite Rock and Local 287. The district court dismissed the claim against IBT under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Granite Rock appeals that dismissal, and we affirm.

In the dispute between Granite Rock and Local 287, the parties appeal and cross-appeal a total of five orders, but we need reach only one: the district court's denial of Local 287's motion to compel arbitration on the question of contract formation. We reverse that ruling and remand with instructions to compel arbitration on the entire dispute between Granite Rock and Local 287.

I

For purposes of analyzing the district court's dismissal of Granite Rock's claims against IBT, Granite Rock's alleged facts must be presumed true

*The Honorable John W. Sedwick, Chief United States District Judge for the District of Alaska, sitting by designation.

and viewed in the light most favorable to Granite Rock. *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1069 (9th Cir.2006). Granite Rock alleges: Granite Rock is a California company engaged in supplying ready mixed concrete for commercial use, and Local 287 represents certain employees at Granite Rock's San Jose facility. Between March 1, 1999 and April 30, 2004, Granite Rock and Local 287 were parties to a collective bargaining agreement ("CBA"). Before expiration of that agreement, the parties began negotiations. Throughout the negotiations, Rome Aloise ("Aloise"), the administrative assistant to the General President of IBT, advised Local 287 that certain provisions of the CBA were inadequate. Aloise also represented the interests of IBT and other local unions affiliated with IBT in the negotiations. No resolution was reached in April or May, and in early June, 2004, after the CBA between Granite Rock and Local 287 expired, Local 287 members went on strike. Negotiations resumed shortly thereafter, and the parties reached a tentative four-year agreement ("new CBA") at 4:00 a.m. on July 2, 2004. This tentative agreement contained a broad arbitration clause requiring the parties to arbitrate "[a]ll disputes arising under this agreement."

At the conclusion of the successful bargaining session, George Netto ("Netto"), Business Representative for Local 287, told Granite Rock's CEO Bruce Woolpert that Netto would put the new CBA to a vote among the union members, would recommend ratification, and would cease picketing. At the same time, Netto raised the topic of a "back-to-work" agreement to provide for the terms under which the parties would return to work, including

liability for actions taken during the strike. However, the parties agreed to discuss preparing a back-to-work agreement at a later date.

*1172 Local 287 members allegedly ratified the new CBA, which contained a "no-strike" clause, later on the morning of July 2, 2004. However, on July 5, 2004, Aloise and members of Local 287 called workers to instruct them not to return to work the next day. On July 6, 2004, Netto demanded a back-to-work agreement that would explicitly shield Local 287, its members, and IBT from any liability arising from the strike. Granite Rock refused to sign such an agreement, and Local 287 continued its strike in violation of the no-strike clause. Throughout the strike, Aloise played an active leadership role; he sent letters to other local unions and employees encouraging their support, held meetings to discuss strategy, and sought to secure financial support for the strike. IBT gave benefits to Local 287 members as long as they did not return to work.

Granite Rock's Third Amended Complaint alleged breach of contract against Local 287, and tortious interference with contract against IBT. Both actions were asserted under section 301(a) of the LMRA, 29 U.S.C. § 185(a). Defendant IBT moved to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The district court granted that motion on the grounds that Granite Rock failed to state a claim against IBT under section 301(a). Granite Rock timely appealed.

There is only one fact that is critical to our determination of whether the entire dispute between Granite Rock and Local 287 should have been submitted to arbitration, and that fact is undisputed:

While the parties disagree about the ratification date, they agree that the tentative new CBA reached on July 2, 2004, contains an arbitration clause that requires arbitration for "[a]ll disputes arising under this agreement." Interpreting this clause, the district court dismissed the issues of breach and damages in favor of arbitration, but retained the question of contract ratification for the district court's determination. Local 287 timely appealed the order retaining the formation question.

Because we determine that the district court erred by denying Local 287's motion to compel arbitration of the entire dispute, and we remand for arbitration, we need not address the appealed orders that arose from the district court's rulings in resolving on the merits the issue of contract formation by ratification.

II

The district court's dismissal of Granite Rock's claims against IBT presents questions of law which we review *de novo*. *Pruitt v. Cheney*, 963 F.2d 1160, 1162-63 (9th Cir. 1992).

[1] Section 301(a) of LMRA, 29 U.S.C. § 185(a), provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Jurisdiction over a claim under section 301(a) requires two things: First, that the claim be "based on an alleged breach of contract between an employer and a labor organization," and second, "that the resolution of the lawsuit be focused upon and governed by the terms of the contract." *Painting & Decorating Contractors Ass'n v. Painters & Decorators Joint Comm., Inc.*, 707 F.2d 1067, 1071 (9th Cir. 1983).

A party need not be a signatory to a CBA to come within the purview of section 301(a). In *Painters & Decorators,**1173 the "Joint Committee" created by the bargaining agreement to administer the terms of the agreement was not a signatory of the agreement. We held that the Committee was still an appropriate defendant under section 301(a) because the CBA created the Committee and governed its rights and duties. *Id.* at 1069.

However, the second part of the *Painters and Decorators* test requires that resolution of any section 301(a) claim be governed by the terms of the relevant agreement. In *Carpenters S. Cal. Admin. Corp. v. Majestic Housing,* 743 F.2d 1341 (9th Cir. 1984), the defendant's property was subject to a mechanic's lien because a party to the collective bargaining agreement had not made required trust contributions. 743 F.2d at 1343. The district court found jurisdiction under section 301(a) because the lien foreclosure would require interpretation of the collective bargaining agreement. *Id.* at 1345. We reversed, holding that "mere reference to the collective bargaining agreement does not make this a case 'arising under' federal law within the meaning of 28 U.S.C. § 1441." *Id.*

Although *Majestic Housing* dealt with rights under a mechanic's lien, its reasoning also applies to tort claims. The underlying agreement in *Majestic Housing* was relevant to the mechanic's lien because the lien could only be foreclosed if the contract was violated, just as a tortious interference with contract claim depends on a breach. The court in *Majestic Housing* held that such a connection is inadequate to satisfy the requirements of section 301(a). 743 F.2d at 1345.

[2] Applying the rule developed in *Majestic Housing,* we conclude that the district court was correct to dismiss Granite Rock's claim against IBT because a claim for tortious interference cannot be said to "arise under" the new CBA between Granite Rock and Local 287. *Majestic Housing,* 743 F.2d at 1345. That agreement did not mention IBT, and did not govern any rights or duties of IBT. Indeed, Granite Rock concedes that the alleged tortious interference could only be a violation of a general tort duty, not a violation of any specific contractual duty. Notwithstanding, Granite Rock contends that the alleged tortious interference claim still meets the requirement that "the resolution of the lawsuit be focused upon and governed by the terms of the contract." *Painters & Decorators,* 707 F.2d at 1071. Granite Rock's theory is that because breach of the underlying contract is a necessary element of the tortious interference claim, the resolution of the tort claim is "focused upon" and "governed by" the contract.

[3] We reject Granite Rock's argument, because its position clashes with the plain language of section 301(a) and the *Majestic Housing* requirement that

the underlying agreement must have *created* the rights or liabilities which the parties seek to vindicate by their suit. *Majestic Housing,* 743 F.2d at 1345. We made this distinction clear in *Majestic Housing*: In *Painters and Decorators,* "the rights and liabilities of both parties were determined by the bargaining agreement," but in *Majestic Housing,* "although the amount of the mechanic's lien must be determined by the terms of the collective bargaining agreement, Majestic has no rights or liabilities *under the agreement.*" *Id.* Similarly, IBT has no rights or duties under the agreement, and thus Granite Rock's tortious interference claim against IBT does not meet the requirements of section 301(a).

Granite Rock makes an additional argument in its unsuccessful attempt to bridge this gap: that the "close relationship" between IBT and Local 287, at least when presented with IBT's aim to "benefit" from *1174 the breach by gaining a release of liability through the proposed back-to-work agreement, justifies allowing a tort claim against IBT. Although Granite Rock's argument has some emotive force, Granite Rock provides no persuasive case support for its position, and does not explain adequately how the concepts of "close relationship" and "benefit" bring IBT within the scope of the contractual rights and obligations created by the new CBA.[1]

---

[1] It is undisputed that the separate back-to-work agreement was never signed, and IBT is not transformed into a third party beneficiary or obligor by supporting an abandoned addendum to the relevant collective bargaining agreement.

Moreover, although there may be limited section 301 remedies available when parties are so intertwined that one is the "alter

The majority of our sister circuits to have considered the question have declined to find a section 301(a) cause of action against parties not governed by the relevant agreement. *See Int'l Union, United Mine Workers of America v. Covenant Coal Corp.*, 977 F.2d 895, 897 (4th Cir. 1992) ("The majority of courts to address the issue have refused to construe section 301 in such a way as to allow [tortious interference claims against non-signatories.]"); *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 501 (5th Cir. 1982) ("[C]ourts have almost unanimously held that a section 301 suit may be brought for violation of a labor contract only against those who are parties to the contract at issue."). Although there are some variations in phrasing, the circuits are almost unanimous in rejecting LMRA jurisdiction over a claim such as Granite Rock's claim against IBT. *See Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561, 572 (2d Cir. 1995) (holding that "at a minimum the defendant must have breached some duty created by a labor contract to be liable for a violation" under section 301(a)); *Covenant Coal*, 977 F.2d at 897 (declining to find jurisdiction under section 301(a) for a tortious interference with contract claim); *Pratt-Farnsworth*, 690 F.2d at 501-02 (holding, in response to plaintiffs' arguments that defendants had "conspired" with the alleged breaching party, that "the absence of a

---

ego" of the other, and a plaintiff might be able to recover by "piercing the veil," *see Local 159 v. Nor-Cal Plumbing, Inc.*, 185 F.3d 978, 984-85 (9th Cir. 1999) (finding jurisdiction under section 301 because the veil-piercing theory "merely concern[ed] the remedy attached to a breach of contract claim governed by LMRA," and was not a separate tort cause of action), Granite Rock did not pursue such a theory in the district court.

contractual relationship between [the parties] requires dismissal of the section 301 claim"); *Serv., Hosp., Nursing Home & Public Employees Union, Local No. 47 v. Commercial Prop. Servs., Inc.*, 755 F.2d 499, 506 (6th Cir. 1985) (holding "that a district court does not have subject matter jurisdiction over a non-signatory to a collective bargaining agreement, where no rights or duties of the non-signatory party are stated in the terms and conditions of the contract"); *Loss v. Blankenship*, 673 F.2d 942, 948 (7th Cir. 1982) (holding "that a complaint for interference with a collective bargaining agreement, against a non-party to that agreement, is not actionable under § 301(a) of the LMRA"); *United Food & Com. Workers Union, Local No. 1564 v. Quality Plus Stores, Inc.*, 961 F.2d 904, 906 (10th Cir. 1992) (concluding "that section 301 does not establish subject-matter jurisdiction for a federal common law claim of tortious interference against an entity that is not a signatory to the contract").

The only circuit to have adopted Granite Rock's position is the Third. *Wilkes-Barre Publishing Co. v. Newspaper Guild Local 120*, 647 F.2d 372 (3d Cir. 1981). In *1175 *Wilkes-Barre*, the court held that tortious interference claims do arise under the underlying contract because "an essential element of the cause of action ... is a violation of the collective bargaining agreement." *Id.* at 380-81. We rejected similar reasoning in *Majestic Housing*, where we held that "mere reference to the collective bargaining agreement" is inadequate to confer jurisdiction under section 301(a). 743 F.2d at 1345.[2]

---

[2] The Eleventh Circuit initially seemed to adopt the Third Circuit's approach in *Local 472, United Ass'n of Journeymen &*

Granite Rock attempts to distinguish cases from other circuits by arguing that they did not deal with parties who are "closely related" or who "benefitted from" the breach. As discussed above, these distinctions are unsupported by precedent and the fact remains that only the Third Circuit has recognized a tortious interference claim under section 301(a).

Granite Rock's assertion that we should create federal common law to reach IBT misinterprets our instructions from Congress and the Supreme Court. The Supreme Court has said that section 301 can be read as a "congressional mandate to the federal courts to fashion a body of common law to be used to address disputes arising out of labor contracts." *Allis-Chalmers v. Lueck,* 471 U.S. 202, 209, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985). However, based on the language of section 301(a) and *Allis-Chalmers,* we understand this as a mandate to create a federal common law of labor contract interpretation, not an independent body of tort law. *Accord, Brazinski v. Amoco Petroleum Additives Co.,* 6 F.3d 1176, 1180 (7th Cir. 1993) ("The common law to be made is a common law of contracts, not a source of independent rights, let alone tort rights; for section 301 is as we have said a grant of jurisdiction only to enforce contracts.").

Apprentices v. Georgia Power Co., 684 F.2d 721, 725 (11th Cir. 1982). However, the Eleventh Circuit then implicitly overruled that precedent when it held, in *Xaros v. U.S. Fid. and Guar. Co.,* 820 F.2d 1176, 1181 (11th Cir. 1987), that section 301(a) jurisdiction did not lie when the defendant was not a signatory to the underlying contract, because the cause of action did not "arise under the agreement but [was] merely related to it." *Id.*

Finally, Granite Rock's invocation of legislative intent does not persuade us. Congress intended to improve the enforcement of bargaining agreements via the LMRA. S.Rep. No. 80-105 (1947). But "[n]othing in the legislative history of § 301 bears on the question of holding a nonsignatory to a collective bargaining agreement." *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 503 n. 6 (5th Cir. 1982). Granite Rock asks us to extrapolate from Congress's general purpose a tort claim against IBT, despite the language of the statute, in the interests of "fundamental fairness." We decline to do so. The plain language of the statute appears to require at least that rights or obligations created by a labor agreement be in contest to support a section 301(a) challenge. Moreover, the persuasive array of authority in our sister circuits counsels against adopting Granite Rock's position, and leads us instead to take the beaten path established by this extra-circuit precedent.

Any "gap" that might exist in Congress's labor law design is for Congress and not for us to fill. When Congress regulates an area comprehensively, as it has done in the federal labor laws, rights and remedies can be defined and circumscribed. Congress has not left parties such as Granite Rock altogether without recourse. It has provided for remedies in labor disputes through both section 301 — against parties to the bargaining agreement — and through the National Labor Relations Act, 29 U.S.C. §§ 151-169. Indeed,*1176 Granite Rock vigorously pursued actions against Local 287 in the federal courts as well as in the National Labor Relations Board. If Congress did not provide a

remedy for Granite Rock directly against IBT on its asserted tortious interference claim, then that is an issue to be addressed by Congress, not by an extraordinary and outlier interpretation of the governing statute.

[4] We affirm the dismissal of Granite Rock's claims against IBT.[3]

III

We review de novo the effect of the arbitration clause in the alleged new CBA between Granite Rock and Local 287. *See Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257, 1267 (9th Cir. 2006) (en banc).

---

[3] Language in section 301(a) of the LMRA strongly suggests that its requirements are necessary to confer subject-matter jurisdiction on the federal courts: The action "may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U.S.C. § 185(a); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (reasoning that similar language in the Clean Water Act made the Act's requirements jurisdictional). This reading is consistent with our precedent. *See Majestic Housing*, 743 F.2d at 1345 (holding that "mere reference" to a collective bargaining agreement does not confer federal question jurisdiction under section 301(a)). Thus, a failure to state a claim under section 301(a) of the LMRA is a defect in subject-matter jurisdiction, and Granite Rock's claim against IBT here should have been dismissed under Federal Rule of Civil Procedure 12(b)(1), not 12(b)(6) as the district court held. This difference in theory, however, leads to the same result of dismissal. We may affirm the district court's dismissal of the claim on any grounds supported by the record, even if the district court did not rely on those grounds. *See United States v. State of Wash.*, 969 F.2d 752, 755 (9th Cir. 1992).

[5] The United States Supreme Court has drawn a distinction between challenges to an arbitration clause and challenges to an entire contract. The Court has stated this general rule: "[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 445-46, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006); *see Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 403-04, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). The Ninth Circuit recognized this dichotomy recently in *Nagrampa,* where we held that federal courts must refer to arbitration those claims seeking to "invalidate or otherwise directly affect the entire contract," 469 F.3d at 1271, but may hear "challenges specifically to [an] arbitration agreement." *Id.* at 1269.

[6] Consistent with this framework, a party generally may not sue in federal court under a contract that, by its terms, requires arbitration. *Teledyne, Inc. v. Kone Corp.,* 892 F.2d 1404 (9th Cir. 1989). In such cases, the matter must be sent to arbitration "unless there is a challenge to the arbitration provision which is separate and distinct from any challenge to the underlying contract." *Id.* at 1410 (citing *Prima Paint,* 388 U.S. at 402-04, 87 S.Ct. 1801). In *Teledyne,* the plaintiff sued for breach of contract, and defendant argued that the draft agreement was never finalized. *Id.* We upheld the dismissal of the claim, in favor of arbitration, to avoid the absurd result where a plaintiff simultaneously argues that the whole contract is valid, but that the court should ignore the arbitration provision which strips its power.

Two years later, we held that a party who disputes the formation of a contract may not be forced to arbitrate the issue of contract formation; otherwise "[p]arty A could forge party B's name to a contract *1177 and compel party B to arbitrate the question of the genuineness of its signature." *Three Valleys Municipal Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1140 (9th Cir. 1991). In *Three Valleys*, plaintiffs sued E.F. Hutton for substantial losses in their investment accounts. *Id.* at 1137. Defendant asserted an arbitration clause in a client agreement, while plaintiffs contended that the entire client agreement was not binding because the signor lacked authority to bind plaintiffs. *Id.* at 1138. The district court directed arbitration of the contract formation issue, and we reversed on the grounds that forcing the formation issue into arbitration would have held the plaintiffs to an arbitration clause upon which they might not have agreed. *Id.* at 1138-42.

The parties' briefing and the district court's careful analysis in the case at bar illuminate the conceptual tension that exists between *Teledyne* and *Three Valleys*. It might be argued that these two cases look in opposite directions: *Teledyne* compelled arbitration on the question of contract formation, *Three Valleys* reserved the formation question for the court. However, the court in *Three Valleys* distinguished its facts from those in *Teledyne* in an instructive way:

> *Teledyne* is a rare case. In *Teledyne*, the plaintiff (1) asserted the validity of the underlying contract containing the arbitration clause by bringing a breach

> of contract action and (2) did not make an independent challenge to the arbitration clause. The plaintiff thus had no ground on which to repudiate the arbitration agreement. As we explained in *Teledyne,* to allow the plaintiff to circumvent arbitration in these circumstances by bringing its claims in federal court would lead to an absurd result....

Three Valleys, 925 F.2d at 1142. This reading of *Teledyne* precisely fits the facts of the case presented by the appeal before us. Whether the facts of this case and of *Teledyne* are "rare" or not, we conclude that the general rule stated by the Supreme Court, reiterated recently in our *en banc* decision in *Nagrampa,* and previously implemented sensibly in *Teledyne,* should be followed.

[7] Here, Granite Rock brings a section 301(a) breach of contract action based on its alleged new CBA with Local 287, which includes an arbitration clause covering "[a]ll disputes arising under this agreement." This clause is broad enough to cover the dispute over contract formation, and Granite Rock does not make an independent challenge to the arbitration clause.[4] Granite Rock "thus ha[s] no

---

[4] While Granite Rock does not argue the arbitration clause is invalid in any way, it does argue briefly that the clause does not cover a dispute over formation. However, Granite Rock offers no support for a narrow reading of the arbitration clause here. Arbitration clauses are to be construed very broadly: "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor

ground on which to repudiate the arbitration agreement." *Three Valleys,* 925 F.2d at 1142. Therefore, we must not allow Granite Rock to "circumvent arbitration in these circumstances by bringing its claim in federal court." *Id.*

Granite Rock contends that because Local 287 has contested the issue of contract formation, Local 287 has repudiated and *1178 waived the arbitration clause and should be estopped from asserting it, even as to questions of breach and damages. We summarily rejected that rationale in *Teledyne,* where the defendant denied the existence of the contract but asserted the arbitration clause. We stated: "Teledyne argues that Kone has no right to enforce the arbitration provision because it has denied that a valid contract exists. If accepted, this argument would produce an absurd result...." 892 F.2d at 1410. Local 287 timely raised the arbitration issue, and thus it is entirely acceptable for Local 287 to argue in the alternative that the agreement was never ratified, but even if it was, this case belongs in arbitration.

This outcome does not fun afoul of *Three Valleys.* The court there ultimately held that "'a party cannot be required to submit [to arbitration] any dispute which he has not agreed so to submit.'" *Three Valleys,* 925 F.2d at 1142 (quoting *AT & T*

---

of coverage." *AT & T Techs., Inc. v. Comm. Workers,* 475 U.S. 643, 650, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (quoting *Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582-83, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960)). Because Granite Rock is suing "under" the alleged new CBA, the arbitration clause is certainly "susceptible of an interpretation" that covers the dispute.

Technologies, Inc. v. Communications Workers, 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)). In *Three Valleys* the party contesting contract formation also resisted arbitration, so it was a permissible outcome to reserve the question of contract formation for the court.

[8] Here, both parties consented to arbitration; Granite Rock implicitly by suing under the contract containing the arbitration clause, and Local 287 explicitly by asserting the arbitration clause. Either might have had the right to a court determination of the formation issue had that right not been waived by asserting the validity of the contract. The holding of *Teledyne* is clear: Parties have no right to access the federal courts when they sue under agreements which, by their terms, remove the federal courts' power to hear the case unless they challenge the arbitration clause independently. *See Teledyne*, 892 F.2d at 1410.

Congress and the Supreme Court have declared a "national policy favoring arbitration." *Buckeye Check Cashing*, 546 U.S. at 443, 126 S.Ct. 1204 (citing the Federal Arbitration Act, 9 U.S.C. §§ 1-16). As courts have noted however, this policy is best served by limiting arbitrators' jurisdiction to those cases where the parties have actually agreed to arbitrate; "[t]he willingness of parties to enter into agreements that provide for arbitration of specified disputes would be 'drastically reduced' ... if a labor arbitrator had the 'power to determine his own jurisdiction ....'" *AT & T*, 475 U.S. at 651, 106 S.Ct. 1415 (quoting Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L.Rev. 1482, 1509 (1959)). When the parties have both consented to arbitration

there are no concerns about arbitrators imposing themselves upon parties. If a party sues under a contract containing a broad arbitration clause, logic dictates that the most reliable way of honoring the parties' expectations is to enforce that arbitration clause from the outset unless the other party shows it never agreed to arbitrate.

When an alleged contract includes a broad arbitration clause, it is sensible to conclude that an arbitrator will hear challenges to contract formation or to the contract as a whole-provided that both parties have consented, in some fashion, to arbitration. *Teledyne* shows that one can consent to arbitration by suing under a contract that includes an applicable arbitration clause.

[9] The challenge here regards contract formation, Granite Rock does not challenge the arbitration clause independently, and both parties have consented to arbitration. As such, Granite Rock's claims against Local 287 should have been dismissed in favor of arbitration.

We **AFFIRM** the district court's judgment dismissing Granite Rock's claims *1179 against IBT, and we **REVERSE** and **REMAND** the district court's order denying Local 287's motion to arbitrate, with instructions that Granite Rock and Local 287 should be compelled to arbitrate their dispute in its entirety. Costs of IBT and of Local 287 shall be borne by Granite Rock.

[Dated July 9, 2004]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

GRANITE ROCK COMPANY, Plaintiff, v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, FREIGHT, CONSTRUCTION, GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 287 (AFL-CIO), and DOES 1 through 20, inclusive, Defendants.	Case No. C 04 2767 EMC COMPLAINT FOR DAMAGES

COMES NOW, the Plaintiff and complains against the Defendant as follows:

JURISDICTION

1. This is a suit for damages pursuant to the National Labor Relations Act § 301(a), 29 U.S.C. § 185(a). This Court has jurisdiction under section 301 and under 28 U.S.C. § 1337.

PARTIES

2. Plaintiff Granite Rock Company ("Plaintiff") is, and at all times material herein, a California corporation engaged in the business of supplying ready mixed concrete for commercial use with its principal office at 350 Technology Drive, Watsonville, California 95077.

3. Defendant International Brotherhood of Teamsters, Freight, Construction, General Drivers, Warehousemen and Helpers, Local No. 287 (hereinafter Defendant Local 287) is, and all times material hereto was, a voluntary, unincorporated association, commonly known as and doing business as a labor organization within the meaning of 29 U.S.C. § 185. At all times material hereto, Defendant Local 287 acted as a labor organization which represented certain Granite Rock Company employees at its San Jose facility referred to as the "Berryessa Plant." Defendant Local 287 is the collective bargaining representative for employees engaged as drivers at the Berryessa Plant. Defendant Local 287 maintains an office and place of business at 1452 No. 4th St., San Jose California 95112.

4. Plaintiff Granite Rock Company is, and at all times material hereto was, an employer in an industry affecting commerce as defined in 29 U.S.C. § 142(1) and (3) and 29 U.S.C. § 152.5(5), and within the meaning of 29 U.S.C. § 185.

5. Under section 301(a) of the National Labor Relations Act (29 U.S.C. § 185(a)), United States district courts have original jurisdiction of actions

arising out of violations of contracts between labor organizations, regardless of citizenship and amount.

CLAIMS FOR RELIEF

6. From the period of March 1, 1999 to April 30, 2004 Plaintiff and Defendant were parties to a collective bargaining agreement which sets forth the terms and conditions of employment for bargaining unit employees. A true and correct copy of the Agreement is attached hereto as Exhibit A and is incorporated herein by reference as though fully set forth.

7. In March 2004, Plaintiff and Defendant Local 287 commenced preliminary negotiations on a new agreement. Thereafter, the parties continued negotiations over the course of the next three months. On April 30, 2004, Plaintiff submitted a "Final Offer" to Defendant Local 287 for review. A "Revised Final Offer" was submitted on or about May 21, 2004. Defendant Local 287 rejected Plaintiff's offers. Subsequently, the parties continued negotiating for a successor agreement. One of the most significant issues in the negotiations was Plaintiff's total economic package proposal including wages and benefits.

8. In early June 2004, after the expiration of the former collective bargaining agreement, the bargaining unit employees at the San Jose facility went out on strike. Subsequently, the parties met again to negotiate regarding the outstanding issues with the key issue being the total economic package. On the evening of Thursday, July 1, 2004 Plaintiff and Defendant Local 287 met for negotiations. At approximately 4:00 a.m. on Friday, July 2, 2004 the

parties reached agreement on terms for a new four-year collective bargaining agreement. The agreement between Plaintiff and Defendant Local 287, on behalf of its officers, agents, and members, was executed for the benefit of Defendant Local 287 and its members. At the conclusion of the session, George Netto, Business Representative, Teamsters Local 287, stated that the contract would be presented to the Union members for ratification at 9:00 a.m. that same day (Friday, July 2, 2004). He also stated that the pickets would be removed. The parties also discussed preparing a Back to Work Agreement at a later time.

9. On or about 9:00 a.m. on Friday, July 2, 2004 a ratification meeting was held with the Granite Rock Company bargaining unit employees. At the meeting, the agreement was presented to the Local 287 members and a ratification vote was held. During the day several employees contacted Plaintiff regarding returning to work. Later that day, Mr. Netto contacted Plaintiff stating "now that we've got things behind us on a new four-year contract, we can take some time to get the Back to Work Agreement done. It would be okay with me if we got it done next week like Wednesday or Thursday."

10. On Monday, July 5, 2004, in repudiation of the collective bargaining agreement and in violation of its provisions, Defendant Local 287 called union members at their homes and instructed, authorized, instigated, and encouraged them not to return to work. To date, Local 287 members remain on strike. The next day (Tuesday, July 6, 2004), Defendant Local 287 informed Plaintiff that its members would not return to work until Plaintiff

executed a Back to Work Agreement guaranteeing amnesty for employees at its other facilities in three counties covered under separate collective bargaining agreements with different unions. Thus requiring Plaintiff to drop its previously issued grievances against the respective unions for violation of the no-strike provisions of their individual labor contracts as a condition of reaching agreement.

11. This work stoppage and these acts of the officers, agents and members of Defendant Local 287 were all in violation of the agreement between Plaintiff and Defendant Local 287. By its actions, Defendant Local 287, its officers, agents and employees have repudiated the agreement.

12. To date, Defendant Local 287 has refused to abide by the terms and conditions of the collective bargaining agreement between it and Plaintiff. The agreement includes a valid no-strike clause that precludes a continuation of the current dispute. Plaintiff has duly performed all conditions of the agreement on its part to be performed such as calling people to work shifts consistent with the agreement.

13. As a result of the actions of Defendant Local 287, its officers, agents, and employees, Plaintiff has been deprived of the benefits of said collective bargaining agreement it negotiated with Defendant Local 287. Without said collective bargaining agreement, Plaintiff is deprived, inter alia, of the benefits of the no-strike protections contained in the contract as well as the labor peace and stability attendant to a collective bargaining agreement.

14. As a result of the action of Defendant Local 287, its officers, agents, and employees, Plaintiff has suffered and will continue to suffer damages in the sum to be determined by proof at trial, but at least $100,000.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays as follows:

1. For damages according to proof;

2. For equitable relief that the Court may deem proper and just;

3. For costs and attorney's fees of suit incurred; and

4. For such other and further relief as the Court may deem proper and just.

Dated: July 9, 2004

/s/

DEBORAH A RICE
LITTLER MENDELSON
A Professional Corporation
Attorneys for Plaintiff
GRANITE ROCK
COMPANY

March 1, 1999,
to
April 30, 2004

AGREEMENT

This Agreement, entered into by and between Granite Rock Company at its San Jose Concrete facility, 11711 Berryessa Road, San Jose, California, hereinafter called "Employer" and Teamsters Local 287 affiliated with the International Brotherhood of Teamsters, Chauffeurs, and Warehousemen of America, hereinafter called the "Union".

The Union shall have exclusive, jurisdiction over all work covered by this Agreement.

All regular employees and equipment of the Employer covered by this Agreement shall perform work before any other employees or equipment are utilized.

SECTION 1 · UNION RECOGNITION

a. The Union is hereby recognized as the representative for bargaining purposes of all persons performing work falling within the classifications hereinafter set forth.

b. The Union hereby recognizes the Employer as the collective bargaining representative for its members covered by this Agreement.

c. The Employer agrees not to enter into any agreement or contract with its employees individually or collectively which in any way conflicts with the terms and conditions of this Agreement. If the Employer continues to violate this

section of the Agreement, after receipt of written notice from the Union, the Union may take any legal or economic action against the Employer and this section shall not be subject to grievance procedures of this Agreement.

SECTION 2 - EQUIPMENT

a. Additional Ready Mixed Trucks. For the purpose of preserving work and job opportunity for employees it is agreed that no ready mix trucks are to be operated other than those that are company owned or leased from the Employer covered by this or any other Teamster agreement whenever practical.

Transfer of Equipment. The Employer has the right to transfer equipment between any company owned operations. However, such transfer of equipment shall not occur to avoid the terms of this Agreement. In the event the Employer permanently transfers equipment for more than 30 days from one local jurisdiction to another within Joint Council of Teamsters #7, the employees affected will be offered the opportunity to move with the equipment by seniority. If the employee chooses to go with the equipment, he/she shall go to the bottom of the seniority list for daily work assignment but will retain the company seniority for all other purposes; provided, however, all employees of the company who have seniority (and are qualified) but are on layoff will be given preference to work on this equipment before the transferred employee. The Union shall be notified of any transfer of equipment.

[Dated July 22, 2004]

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

GRANITE ROCK COMPANY, Plaintiff, v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, FREIGHT, CONSTRUCTION, GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 287 (AFL-CIO), and DOES 1 through 20, inclusive, Defendants.	Case No. C 04 2767 JW FIRST AMENDED COMPLAINT FOR INJUNCTIVE RELIEF AND DAMAGES

COMES NOW, the Plaintiff and complains against the Defendant as follows:

JURISDICTION

1. This is a suit for injunctive relief and damages pursuant to Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a). This Court has jurisdiction under section 301 and under 28 U.S.C. § 1337.

PARTIES

2. Plaintiff Granite Rock Company ("Plaintiff") is, and at all times material herein, a California corporation engaged in the business of supplying ready mixed concrete for commercial use with its principal office at 350 Technology Drive, Watsonville, California 95077. In the past twelve months, Granite Rock has purchased more than $50,000 worth of goods and supplies directly from points located outside the State of California. Id. Thus, Granite Rock is an "employer" as that term is defined in the Labor Management Relations Act of 1947, as amended.

3. Defendant International Brotherhood of Teamsters, Freight, Construction, General Drivers, Warehousemen and Helpers, Local No. 287 (hereinafter Defendant Local 287) is, and all times material hereto was, a voluntary, unincorporated association, commonly known as and doing business as a labor organization within the meaning of 29 U.S.C. § 185. At all times material hereto, Defendant Local 287 acted as a labor organization which represented certain Granite Rock Company employees at its San Jose facility referred to as the "Berryessa Plant." Defendant Local 287 is the collective bargaining representative for employees engaged as drivers at the Berryessa Plant. Defendant Local 287 maintains an office and place of business at 1452 No. 4th St., San Jose California 95112.

4. Plaintiff Granite Rock Company is, and at all times material hereto was, an employer in an industry affecting commerce as defined in 29 U.S.C.

§ 142(1) and (3) and 29 U.S.C. § 152.5(5), and within the meaning of 29 U.S.C. § 185.

5. Under section 301(a) of the Labor Management Relations Act (29 U.S.C. § 185(a)), United States district courts have original jurisdiction of actions arising out of violations of contracts between labor organizations, regardless of citizenship and amount.

CLAIMS FOR RELIEF

6. From the period of March 1, 1994 to April 30, 2004 Plaintiff and Defendant were parties to a collective bargaining agreement which sets forth the terms and conditions of employment for bargaining unit employees. (See Exhibit A to the declaration of Bruce Woolpert, "Woolpert Decl.").

7. In March 2004, Plaintiff and Defendant Local 287 commenced preliminary negotiations on a new agreement. Thereafter, the parties continued negotiations over the course of the next three months. On April 30, 2004, Plaintiff submitted a "Final Offer" to Defendant Local 287 for review. A "Revised Final Offer" was submitted on or about May 21, 2004. Defendant Local 287 rejected Plaintiffs offers. Subsequently, the parties continued negotiating for a successor agreement. One of the most significant issues in the negotiations was Plaintiff's total economic package proposal including wages and benefits.

8. In early June 2004, after the expiration of the former collective bargaining agreement, the bargaining unit employees at the San Jose facility went out on strike. Subsequently, the parties met

again to negotiate regarding the outstanding issues with the key issue being the total economic package. On the evening of Thursday, July 1, 2004 Plaintiff and Defendant Local 287 met for negotiations. At approximately 4:00 a.m. on Friday, July 2, 2004 the parties reached agreement on terms for a new four-year collective bargaining agreement covering the term of May 1, 2004 through April 30, 2008. At the conclusion of the session, George Netto, Business Representative, Teamsters Local 287, stated that the contract would be presented to the Union members for ratification at 9:00 a.m. that same day (Friday, July 2, 2004). He also stated that the pickets would be removed.

9. The parties agreed to maintain the same contract language as the previous agreement except as noted in Plaintiff's July 2, 2004 "Final Offer." (See July 2, 2004 "Final Offer," Exhibit B, "Woolpert Decl."). The grievance and arbitration provisions set forth in Section 20 of the prior collective bargaining agreement remain the same in the new Agreement with one exception not relevant to this matter. At the conclusion of the session, the parties discussed preparing a Back to Work Agreement at a later date. During subsequent conversations regarding the Back to Work Agreement, the parties agreed that any such agreement would be subject to the grievance procedure.

10. On or about 9:00 a.m. on Friday, July 2, 2004 a ratification meeting was held with the Granite Rock Company bargaining unit employees. At the meeting, the agreement was presented orally to the Local 287 members and a ratification vote was held. Plaintiff is informed and believes that the employees

voted on the contract and approved it. That same day, several employees contacted Plaintiff regarding returning to work. Later that day, Mr. Netto contacted Plaintiff and stated the Agreement was ratified.

11. The portions of the Agreement which are material to this Complaint are Section 19 ("Discharge/Suspension"), Section 20 ("Grievance Procedure") and Section 22 ("Strikes and Lockouts"). Section 19 provides a just cause standard for discharge and suspension of bargaining unit employees. Section 20 provides a compulsory grievance and arbitration procedure for the settlement of any disputes between Plaintiff and Defendant arising from the application of any provisions of the Agreement or affecting the relation of the employees and the Employer. Unresolved grievances may be submitted to an Arbitrator specifically selected by the parties. The decision of the Arbitrator is final and binding on the parties. Section 22 of the Agreement concerns the circumstances in which employees may lawfully strike under the Agreement.

12. It is well settled that in exchange for a compulsory grievance and binding arbitration procedure, a union signatory to such a collective bargaining agreement is obligated not to strike over a dispute arising out of the application or interpretation of the Agreement.

13. On Monday, July 5, 2004, in repudiation of the collective bargaining agreement and in violation of its provisions, Defendant Local 287 called union members at their homes and instructed, authorized, instigated, and encouraged them not to return to

work. The next day (Tuesday, July 6, 2004), Defendant Local 287 informed Plaintiff that its members would not return to work until Plaintiff executed a Back to Work Agreement guaranteeing amnesty for its employees and for employees at Plaintiff's other facilities in three counties covered under separate collective bargaining agreements with different unions. Thus requiring Plaintiff to drop its previously issued grievances against the respective unions for violation of the no-strike provisions of their individual labor contracts as a condition of reaching agreement. To date, Local 287 members remain engaged in an unlawful strike in clear violation the Agreement. Additionally, Plaintiff's employees covered under separate collective bargaining agreements with different unions are refusing to cross the Teamsters' picket line at Plaintiff's other facilities.

14. To date, Defendant Local 287 has refused to abide by the terms and conditions of the collective bargaining agreement between it and Plaintiff. The agreement includes a valid no-strike clause that precludes a continuation of the current dispute. Plaintiff has duly performed all conditions of the agreement on its part to be performed such as calling people to work shifts consistent with the agreement. By its actions and conduct alleged herein, Defendant has breached the Agreement between Plaintiff and Defendant, and, in particular, the compulsory grievance and arbitration provisions and Defendant's no-strike obligation inherent in the Agreement.

15. As a result of the actions of Defendant Local 287, its officers, agents, and employees, Plaintiff has

been deprived of the benefits of said collective bargaining agreement it negotiated with Defendant Local 287. Without said collective bargaining agreement, Plaintiff is deprived, inter alia, of the benefits of the no-strike protections contained in the contract as well as the labor peace and stability attendant to a collective bargaining agreement.

16. Plaintiff is informed and believes that said strikes will continue unless judicial relief is obtained.

17. Plaintiff is willing to participate in the grievance and arbitration proceedings provided in the Agreement, subject to all rights and defenses available to it.

18. By reason of the aforesaid breach of the Agreement, Plaintiff has been unfairly and improperly prevented from conducting its normal business activities of supplying ready mix concrete for its commercial customers. Plaintiff has suffered and will continue to suffer great and irreparable damage by reason of Defendant's action in that Plaintiff will not be able to conduct its normal business activities.

19. Plaintiff is informed and believes that Defendant will continue said unlawful work stoppage unless restrained and enjoined by this Court. Plaintiff has no plain, speedy or adequate remedy at law, and unless Defendant is immediately restrained from continuing its unlawful strike action, Plaintiff will continue to sustain great and irreparable injury and damage as herein alleged. Plaintiff's business is one that is extremely competitive and, therefore, requires reliability and

continuity of service on a daily basis; any disruption of such service will cause irreparable injury to Plaintiff's ability to maintain its market share. If Plaintiff is unable to provide concrete to complete projects that have already commenced, its customers must obtain it from Plaintiff's competitors. The nature of such purchases makes it unlikely that customers will return. Further, as a result of the strike, key Santa Clara County Public Works construction projects have been delayed including roadway improvements scheduled to begin Tuesday, July 13, 2004. This not only is causing irreparable harm to Granite Rock, but poses safety concerns for Santa Clara County. A prolonged inability to provide concrete will likely cause a devastating loss of these long term construction projects, which are the lifeblood of Plaintiff's business.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays as follows:

1. That the officers, agents, representatives, employees and members, and all other persons acting at the direction of, or in concert with, said Defendant, be permanently enjoined and restrained from engaging in any of the following activities during the lesser of (1) the pendency of this action or (2) the life of the Agreement:

> engaging in any strike, slowdown or other concerted refusal to perform work in violation of the parties' collective bargaining agreement concerning any dispute, complaint or grievance with Plaintiff regarding the discipline and/or amnesty of 'striking employees.

2. That pending a final determination in this action, this Court make an Order directing Defendant to withdraw any orders or directions to employees of Plaintiff that said employees should engage in a cessation of work concerning any dispute, complaint or grievance with Plaintiff regarding the discipline and/or amnesty of striking employees.

3. That this Court make an Order directing Defendant herein to show cause at a time and place appointed in said Order why Defendant and all others referred to in Paragraph 1 of this prayer should not be enjoined and restrained during the lesser of (1) the pendency of this action or (2) the life of the Agreement from doing any of the things hereinabove mentioned in Paragraph 1.

4. That a Temporary Restraining Order be granted Plaintiff, enjoining and restraining Defendant, and all others referred to in Paragraph 1 of this prayer, from doing any of the things and acts hereinabove mentioned in Paragraph 1 and to do the things mentioned in Paragraph 2, pending the hearing of said Order to Show Cause.

5. That upon the hearing of said Order to Show Cause, a Preliminary Injunction be granted herein, enjoining and restraining Defendant and all others referred to in Paragraph 1 during the lesser of (1) the pendency of this action or (2) the life of the Agreement.

6. For damages according to proof.

7. That Plaintiff be allowed its costs of suit an attorneys' fees herein incurred.

8. For such other and further relief as the Court may deem proper and just.

Dated: July 22, 2004

/s/

DEBORAH A. RICE
LITTLER MENDELSON
A Professional Corporation
Attorneys for Plaintiff
GRANITE ROCK
COMPANY

[Proceedings Occurring On July 26, 2004]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

GRANITE ROCK, PLAINTIFF, v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, DEFENDANT.	C-04-2767-JW SAN JOSE, CALIFORNIA JULY 27, 2004

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES WARE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:	LITTLER MENDELSON BY: GARRY MATHIASON; ALAN LEVINS 650 CALIFORNIA STREET 20TH FLOOR SAN FRANCISCO, CALIFORNIA 94018
FOR THE DEFENDANT:	BEESON, TAYER & BODINE BY: DUANE BEESON 1404 FRANKLIN STREET FIFTH FLOOR OAKLAND, CALIFORNIA 94612 OFFICIAL COURT
REPORTER:	IRENE RODRIGUEZ, CSR, CRR CERTIFICATE NUMBER 8074

INDEX OF PROCEEDINGS

FOR THE PLAINTIFF:

BRUCE WOOLPERT

DIRECT EXAMINATION BY MR. LEVINS P.37

CROSS-EXAM. BY MR. BEESON P.55

REDIRECT EXAM BY MR. LEVINS P.66

FOR THE DEFENDANT:

GEORGE NETTO

DIRECT EXAMINATION BY MR. BEESON P.69

CROSS-EXAM BY MR. MATHIASON P.85

REDIRECT EXAM BY MR. BEESON P.110

INDEX OF EXHIBITS

FOR THE PLAINTIFF:

C ADMITTED P.90

FOR THE DEFENDANT:

D MARKED P.110

ADMITTED P.111

SAN JOSE, CALIFORNIA JULY 26, 2004

PROCEEDINGS

(WHEREUPON, COURT CONVENED AND THE FOLLOWING PROCEEDINGS WERE HELD:)

[3] THE CLERK: MATTER OF CIVIL-04-2767, GRANITE ROCK COMPANY VERSUS INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 287.

PLAINTIFF'S APPLICATION FOR TEMPORARY RESTRAINING ORDER.

COUNSEL, STEP FORWARD AND STATE YOUR APPEARANCE FOR THE RECORD, PLEASE.

[3] MR. LEVINS: FOR THE PLAINTIFF AND MOVING PARTY THE LAW FIRM OF LITTLER MENDELSON BY ALAN LEVINS AND GARRY MATHIASON.

[3] MR. BEESON: FOR TEAMSTERS LOCAL 287, BEESON, TAYER & BODINE, DUANE BEESON.

[3] THE COURT: GOOD AFTERNOON. THIS WAS SET UP QUITE HURRIEDLY BECAUSE THE COURT RECEIVED A MOTION FOR A TEMPORARY RESTRAINING ORDER AND A REQUEST FOR ISSUANCE OF AN ORDER TO SHOW CAUSE, AND WHENEVER WE RECEIVE A REQUEST FOR A TEMPORARY RESTRAINING ORDER, IT COMES TO OUR IMMEDIATE SCRUTINY TO DETERMINE WHETHER OR NOT THERE ARE CIRCUMSTANCES WHICH WOULD REQUIRE THE COURT TO EXERCISE ITS

DISCRETION TO STOP CONDUCT THAT IS UNDERWAY OR ORDER ANYONE TO DO SOMETHING EARLY IN A LITIGATION.

[4] THIS IS, AS I UNDERSTAND IT, A DISPUTE WHICH ARISES OUT OF A LABOR MANAGEMENT PROBLEM BETWEEN GRANITE ROCK COMPANY AND THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 3, RATHER, 287 AFL CIO.

I'VE READ THROUGH THE PAPERS. THE PROBLEM THAT CONFRONTS THE COURT IMMEDIATELY WITH RESPECT TO THIS APPLICATION IS THE POSITION TAKEN BY THE TEAMSTERS LOCAL 287 THAT THIS IS NOT A CIRCUMSTANCE THAT IS GOVERNED BY A SUBSISTING LABOR MANAGEMENT AGREEMENT.

AND SO LET ME TURN FIRST TO THE PLAINTIFF TO RESPOND TO THE DECLARATION OF MR. NETTO AND OF COUNSEL MR. BEESON AND THE MEMORANDUM OF LAW WITH RESPECT TO THAT PROBLEM.

[4] MR. LEVINS: THANK YOU, YOUR HONOR. AND THANK YOU FOR HEARING US ON SHORT NOTICE. WE REALLY APPRECIATE THIS. WE CONSIDER THIS AN EMERGENCY. WE HAVE A STRIKE HERE IN VIOLATION OF A COLLECTIVE BARGAINING AGREEMENT.

IN ADDRESSING THE DECLARATION OF MR. NETTO, IT DIDNT HAPPEN THAT WAY, YOUR HONOR. WE HAVE MR. WOOLPERT IN

THE COURT HERE WHO WILL TESTIFY TO EXACTLY WHAT HAPPENED ON THE MORNING OF JULY 2ND BOTH AT 3:30 A.M. AND AT 9:00 A.M. AND ALSO WHO WILL TESTIFY WHAT HE WAS TOLD SPECIFICALLY BY MR. NETTO AND THAT IS THAT THE COLLECTIVE BARGAINING AGREEMENT THAT THE UNION IS STRIKING IN VIOLATION OF WAS FULLY RATIFIED THAT MORNING, THE MORNING OF JULY 2ND. THAT'S EXACTLY WHAT HE TOLD MR. WOOLPERT AND HE SAID, THEREFORE, WE CAN GO AHEAD AND WORK ON THE BACK-TO-WORK AGREEMENT BUT THERE'S NO URGENCY IN DOING THAT BECAUSE WE CAN DO THAT NEXT WEEK, WE CAN DO THAT WEDNESDAY OR THURSDAY. WE ALREADY HAVE AN AGREEMENT. WE HAVE A FOUR-YEAR AGREEMENT AND EMPLOYEES CAN COME BACK TO WORK.

SO THERE IS A DISPUTE OF FACT. WE HAVE MR. WOOLPERT HERE READY TO TESTIFY. HE WAS TOLD EXACTLY THAT.

IN ADDITION, THE PICKETS WERE WITHDRAWN FROM THE SITE AND THE COURT SHOULD BEAR IN MIND THAT THIS IS EXACTLY THE PROCEDURE THAT THE PARTIES HAD USED IN THE PAST WHEN THEY NEGOTIATED THE GILROY AGREEMENT, THAT IS EXACTLY WHAT HAPPENED.

THE PARTIES REACHED AN AGREEMENT, THE EMPLOYEES WENT BACK TO WORK AND AFTER THE EMPLOYEES WENT BACK TO WORK UNDER THE NEW AGREEMENT A BACK—TO—WORK AGREEMENT WAS

NEGOTIATED AND THAT'S EXACTLY WHAT WAS CONTEMPLATED IN THIS CASE.

IN FACT, MR. NETTO SPECIFICALLY SAID WE CAN DO IT THE SAME WAY WE DID IT AT GILROY.

[6] THE COURT: LET ME SLOW YOU DOWN.

[6] MR. LEVINS: SURE.

[6] THE COURT: OF COURSE THE FIRST ISSUE I'M TRYING TO GET A HANDLE ON WITH RESPECT TO THIS DISPUTE IS THIS, QUESTION OF RATIFICATION.

DO YOU AGREE THAT RATIFICATION WAS NECESSARY IN ORDER FOR THE LABOR MANAGEMENT CONTRACT TO GO INTO EFFECT?

[6] MR. LEVINS: NOT AS A MATTER OF LAW BUT THE PARTIES AGREED THAT THEY WOULD DO IT THAT WAY.

[6] THE COURT: NOT AS A MATTER OF LAW. IN OTHER WORDS, THE LAW WITH RESPECT TO THESE, AND I'M A GENERALIST HERE, YOU HAVE TO HELP ME OUT.

[6] MR. LEVINS: SURE.

[6] THE COURT: THE LABOR MANAGEMENT RELATIONS ACT DOES NOT REQUIRE RATIFICATION OF A LABOR MANAGEMENT AGREEMENT BETWEEN A COMPANY AND ITS EMPLOYEES IN ORDER FOR THAT AGREEMENT TO BE EFFECTIVE.

[6] MR. LEVINS: THAT'S EXACTLY RIGHT. AND HOW DO YOU, HOW DO YOU DISTINGUISH BETWEEN A CIRCUMSTANCE WHERE THERE IS A GOVERNING AGREEMENT AND ONE THAT ISN'T AND ONE THAT DOESN'T HAVE TO BE RATIFIED TO BE EFFECTIVE?

[7] MR. LEVINS: THE CASE WE CITED I BELIEVE THE MACK CASE STATED THAT WHAT THE COURT DOES IS LOOK AT THE AGREEMENT THE WAY IT DOES ANY OTHER AGREEMENT.

CAN THE PARTIES REACH A MEETING OF THE MINDS? DID THEY SHAKE HANDS FIGURATIVELY? AND THERE'S NOTHING MAGICAL ABOUT A COLLECTIVE BARGAINING AGREEMENT IN THAT SENSE. IT'S LIKE AN AGREEMENT OF ANY KIND.

[7] THE COURT: SO THAT PARTIES CAN AGREE AND IN A COLLECTIVE BARGAINING AGREEMENT NOT TO HAVE IT RATIFIED?

[7] MR. BEESON: THAT'S CORRECT.

[7] MR. LEVINS: THEY CAN AGREE TO THAT, THAT'S RIGHT. AND THE AGREEMENT DOESN'T HAVE TO BE WRITTEN DOWN EITHER.

[7] THE COURT: IT DOESN'T HAVE TO BE IN WRITING. IN THIS CASE WAS THERE AN AGREEMENT THAT WOULD NOT GO INTO EFFECT UNTIL IT WAS RATIFIED?

[7] MR. LEVINS: THE PARTIES DID UNDERSTAND AND IN FACT IT WAS ON ONE OF THE EMPLOYER PROPOSALS THAT THE AGREEMENT WOULD BE RATIFIED.

[8] THE COURT: THAT WASN'T MY QUESTION. WAS THERE AN AGREEMENT THAT IT WOULDN'T BE EFFECTIVE UNTIL IT WAS RATIFIED?

[8] MR. LEVINS: THAT WAS THE UNDERSTANDING.

[8] THE COURT: ALL RIGHT. SO THEN THE QUESTION BECOMES WAS IT RATIFIED? I UNDERSTAND YOUR POSITION TO HAVE BEEN YOU WERE TOLD THAT IT WAS, BUT WHETHER OR NOT IT WAS IS A QUESTION OF WHETHER OR NOT THERE WAS A VOTE OF SOME SORT, RATIFICATION BEING A VOTE TAKEN BY THE RANK AND FILE MEMBERSHIP OF THE LOCAL.

[8] MR. LEVINS: IT DOESN'T HAVE TO BE A VOTE. IT CAN BE LIKE ANY RATIFIED, WE OKAYED THE AGREEMENT. IT COULD BE A FORMAL VOTE. IT DOESN'T HAVE TO BE A FORMAL VOTE.

[8] THE COURT: HOW WOULD IT BE EXPRESSED IF IT'S NOT BY A VOTE?

[8] MR. LEVINS: ANYWAY THE UNION WANTS BUT IN TERMS OF THIS—IT'S AN INTERNAL UNION SITUATION AND WE WERE TOLD BY MR. NETTO WHO WAS THERE THAT, IN FACT, THE RATIFICATION OCCURRED. AND I THINK

THAT'S KEY. I THINK THAT'S REALLY THE ISSUE.

THE UNION CAN'T BACKTRACK NOW AND SAY, NO, IT DIDN'T REALLY OCCUR, OR IT DOESN'T COUNT, OR, YOU KNOW, THIS WAS A PRACTICE VOTE OR WHATEVER THEY MIGHT SAY. WE HAD A MEETING OF THE MINDS.

WHEN MR. NETTO TURNED TO MR. WOOLPERT AND SAID WE HAVE RATIFICATION, THAT'S ALL THAT HAD TO HAPPEN. THEN WE HAVE A DEAL. BECAUSE ASSUME THIS WAS A CONDITION PRECEDENT, IT WAS A CONDITION PRECEDENT THAT THE UNION HAD FULL CONTROL OF. AND THE MINUTE THE UNION TOLD THE EMPLOYER THAT THIS CONDITION HAD PASSED, WE HAD EVERY RIGHT TO ACT IN ACCORDANCE WITH THAT AND WE HAD EVERY RIGHT TO BELIEVE AND, IN FACT, DO HAVE AN EFFECTIVE COLLECTIVE BARGAINING AGREEMENT.

[9] THE COURT: IN THE NORMAL WORKING RELATIONSHIP, THESE SORTS OF THINGS ARE NOT DONE FORMALLY I TAKE IT, RATIFICATION AND CERTIFICATION OF ELECTIONS, THOSE SORTS OF THINGS ARE NOT DONE FORMALLY?

[9] MR. LEVINS: RATIFICATION VARIES FROM UNION TO UNION. SOME UNIONS DON'T HAVE RATIFICATION AT ALL.

[9] THE COURT: AND IN THIS CASE THOUGH?

[9] MR. LEVINS: WELL, WHAT'S YOUR QUESTION?

[9] THE COURT: WHETHER OR NOT IT IS THE PRACTICE IN THIS CASE FOR RATIFICATION TO BE DONE FORMALLY, THAT IS A LETTER CONFIRMING IT OR SOME DOCUMENT CERTIFYING THAT AN ELECTION HAS TAKEN PLACE.

[10] MR. LEVINS: EXCUSE ME. NO, NOT AT ALL, YOUR HONOR. AS IN THE GILROY SITUATION, WE WAIT TO HEAR FROM MR. NETTO AND MR. NETTO INFORMS US THAT THE AGREEMENT HAS BEEN RATIFIED AND WE PROCEED FROM THERE. IT'S EXACTLY WHAT HAPPENED IN THE GILROY SITUATION.

[10] THE COURT: AND IF MR. NETTO SAYS IT WAS INDEED RATIFIED WHEN IT WAS DONE, WHAT IS THE EFFECT OF THAT IN YOUR POSITION?

[10] MR. LEVINS: THE EFFECT IS THAT WE HAVE A MEETING OF THE MINDS, THAT WE HAVE A COLLECTIVE BARGAINING AGREEMENT AND IF MR. NETTO SAYS ALL CONDITIONS PRECEDENT ARE TAKEN CARE OF AND SHAKES HANDS AND SAYS THAT WE HAVE AN AGREEMENT, THAT'S ALL THAT MATTERS. HE'S THE AGENT OF THE UNION AND HE HAS FULL AUTHORITY TO ENTER INTO AN AGREEMENT WITH US AS FAR AS WE KNOW AND WHEN HE TELLS US THERE'S AN AGREEMENT, THAT MEANS THERE'S AN AGREEMENT.

[10] THE COURT: MY QUESTION WAS IF HE WERE AN AGENT WHO WAS AUTHORIZED BY THE UNION TO SIGN AN AGREEMENT ON ITS BEHALF, IF IT WAS RATIFIED, AND IT WASN'T RATIFIED, WHAT IS THE LEGAL CONSEQUENCE OF THAT?

[11] MR. LEVINS: WELL, HIS UNION MAY HAVE SOME CLAIM AGAINST HIM. IT MAY BE THE DFR CLAIM, THE DUTY OF FAIR REPRESENTATION CLAIM, BUT VIS-A-VIS THE EMPLOYER, VIS-A-VIS THE OSTENSIBLE AGENT THERE IS A DEAL.

[11] THE COURT: ALL RIGHT. NOW, WHAT WAS LEFT ON THE TABLE BY MY UNDERSTANDING HAS TO DO WITH A RETURN-TO-WORK AGREEMENT. WHAT IS THAT?

[11] MR. LEVINS: VERY OFTEN, BUT NOT ALWAYS, AFTER A STRIKE THE PARTIES TRY AND WORK OUT SOME DISAGREEMENTS THAT HAVE OCCURRED DURING THE COURSE OF THE STRIKE. IF THOSE AGREEMENTS ARE NOT WORKED OUT, THEN THESE DISAGREEMENTS, THESE DISPUTES WOULD BE RESOLVED THROUGH, THROUGH THE GRIEVANCE PROCEDURE OF THE COLLECTIVE BARGAINING AGREEMENT, BUT IN ORDER TO SHORT CIRCUIT, IF THERE ARE DISAGREEMENTS, THE PARTIES CAN SIT DOWN AND SAY, FOR EXAMPLE, CERTAIN EMPLOYEES WILL COME BACK AT A CERTAIN TIME, CERTAIN EMPLOYEES WILL COME BACK LATER, CERTAIN DISCIPLINE WILL EITHER BE WAIVED OR EFFECTUATED AND THERE'S ALL KIND OF BACK-DOOR ISSUES THAT THE

PARTIES CAN EITHER RESOLVE THEMSELVES OR PUT THROUGH THE GRIEVANCE AND ARBITRATION PROCEDURE.

[12] THE COURT: ALL RIGHT. AND IN THE PAST YOU LISTED THAT AS SOMETHING THAT WOULD BE DONE AFTER THE AGREEMENT AND AFTER RATIFICATION OF THE AGREEMENT?

[12] MR. LEVINS: EXACTLY.

[12] THE COURT: AND IN THIS CASE IT HAS YET TO BE DONE?

[12] MR. LEVINS: THAT'S RIGHT. WE, WE THE BACK-TO-WORK AGREEMENT HAS YET TO BE COMPLETED. AND—

[12] THE COURT: AND WHAT IS THE EFFECT OF THAT?

[12] MR. LEVINS: THE EFFECT OF THAT IS THAT EITHER THERE WILL BE AN AGREEMENT WITH RESPECT — WITH REGARD TO THE BACK-TO-WORK ISSUES WHETHER THERE WILL BE CERTAIN DISCIPLINE OR NOT OR WHETHER EMPLOYEES WILL COME BACK AT A CERTAIN TIME OR NOT OR WHETHER SO MANY TRUCKS WILL BE ISSUED OR NOT OR THEY WILL BE RESOLVED BY THE COLLECTIVE BARGAINING AGREEMENT.

IN FACT, ONE OF THE ISSUES BEFORE YOUR HONOR IS THE FACT THAT DISCIPLINE WAS, IS ONE OF THE ISSUES IN THE BACK-TO-WORK AGREEMENT, WHETHER THERE WILL BE

AMNESTY FOR EMPLOYEES OF LOCAL 287 WHO WENT OUT ON STRIKE. CLEARLY A GRIEVABLE ISSUE.

AND THAT THE PARTIES ATTEMPTED TO WORK THAT OUT THROUGH THE BACK-TO-WORK AGREEMENT, HAVE NOT WORKED IT OUT THROUGH THE BACK-TO-WORK AGREEMENT, AND, THEREFORE, IT HAS TO BE RESOLVED THROUGH THE GRIEVANCE PROCEDURE.

[13] THE COURT: VERY WELL. LET ME INTERRUPT YOUR COMMENTS AND HEAR FROM YOUR OPPONENT.

[13] MR. BEESON: MAY IT PLEASE THE COURT, WHEN HE SAYS IT DOES NOT REQUIRE RATIFICATION OF THE AGREEMENTS I BELIEVE OF MANAGEMENT AGREEMENTS.

IT'S A MATTER OF WHAT THE PARTIES THEMSELVES AGREED TO. IN THIS SITUATION LOCAL 287 IS AN AFFILIATE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS AND A CONSTITUTION WHICH IS BINDING ON THE AFFILIATED LOCALS REQUIRES RATIFICATION BY SECRET BALLOT VOTE.

NOW, THAT HAS BEEN TRADITIONAL IN THE RELATIONSHIP BETWEEN THESE PARTIES AND AS INDEED ACROSS THE BOARD WITH RESPECT TO ALL TEAMSTER LOCAL UNIONS.

I DON'T THINK THERE'S ANY QUESTION ABOUT THAT. MR. LEVINS INDICATED THAT

THAT WAS THE UNDERSTANDING AND INDEED IT WAS. THERE WOULD HAVE TO BE RATIFICATION BEFORE THE AGREEMENT BECAME EFFECTIVE AND THE RANK AND FILE MEMBERS, AND JUDGE WARE COULD HAVE TURNED IT DOWN IF HE WANTED TO. IT HAS TO BE BY SECRET BALLOT VOTE.

NOW, THE PROBLEM HERE OR ONE OF THE PROBLEMS IS THAT AS FAR AS THE UNION IS CONCERNED, WE REPRESENT TO THE COURT THAT IT WAS NOT RATIFIED.

MR. NETTO EXPLAINED TO THE RANK AND FILE AT THE MEETING ON JULY 2ND, AFTER THE NEGOTIATIONS HAD BEEN CONCLUDED THAT THERE WAS A RIGHT RETURN-TO-WORK AGREEMENT, WHICH COULD EFFECT THEIR OWN INTERESTS AND THEIR OWN EMPLOYMENT WHICH HAD TO BE CONCLUDED BEFORE HE WOULD SUBMIT THE TENTATIVE AGREEMENT FOR RATIFICATION.

THE DECLARATION OF MR. NETTO ALSO MAKES CLEAR THAT HE INFORMED MR. WOOLPERT, THE REPRESENTATIVE OF THE EMPLOYER, OF THAT FACT AS THE CLOSE OF THE MEETING, THE NEGOTIATING MEETING ON JULY 2ND.

AS A MATTER OF FACT, I DON'T THINK IT IS CONTESTED AND IT'S IN MR. NETTO'S DECLARATION, MR. NETTO RAISED THE QUESTION ABOUT A RETURN-TO-WORK AGREEMENT. MR. WOOLPERT HAD ALREADY DRAFTED A PROPOSAL. AND IT WAS HANDED

TO MR. NETTO AT THAT NEGOTIATION MEETING AT THE VERY END.

MR. NETTO LOOKS THROUGH IT. HE SAW QUICKLY THAT THERE WAS ONE PARTICULAR PROVISION THAT HE WOULD NEVER AGREE TO HAVING TO DO WITH THE RIGHT OF THE EMPLOYER AFTER THE STRIKE HAD FINISHED AND AFTER THE CONTRACT HAD BEEN RATIFIED HIS PROPOSAL SAID NEVERTHELESS MR. WOOLPERT, GRANITE ROCK, WOULD HAVE THE RIGHT TO CONTINUE TO USE SOME NONUNION DRIVERS AND NONUNION EQUIPMENT THAT HE HAD USED DURING THE STRIKE. AND MR. NETTO EXPRESSED HIS COMPLETE OPPOSITION TO THAT.

BUT HE ALSO SAID, MR. NETTO SAID THE MATTER WOULD HAVE TO BE REVIEWED BY THE ATTORNEY WHO WAS MYSELF AND THAT THERE WOULD BE A RESPONSE MADE.

WELL, THAT HAPPENED THE SAME MORNING OF JULY THE 2ND AND MR. NETTO DRAFTED THE RESPONSE, WHICH WAS A COUNTER PROPOSAL FOR THE RIGHT TO WORK PROPOSAL. HE FAXED IT TO MR. WOOLPERT AT A LOCATION THAT MR. WOOLPERT SAID HE WAS GOING TO BE. FOR WHATEVER REASON, MR. WOOLPERT DID NOT GET THAT FAX.

NOW, THIS WAS NOW JULY 2ND. JULY 3RD WAS SATURDAY THE DAY BEFORE THE 4TH OF JULY. JULY 4TH CAME ON A SUNDAY AND THERE WAS A HOLIDAY ON THE 5TH SO

NOTHING REALLY HAPPENED. THERE WERE NO COMMUNICATIONS UNTIL THE 6TH.

ON THE 6TH WHEN MR. WOOLPERT SAID THAT HE HAD NOT RECEIVED THE COUNTER PROPOSAL, MR. NETTO QUICKLY FAXED IT TO HIM AND HE SAW IT FOR THE FIRST TIME AND THAT BEGAN THE REAL DISPUTE IN THIS CASE AS TO WHETHER THE STRIKE WAS OVER OR WHETHER THE STRIKE WAS CONTINUING BECAUSE THERE HAD NOT BEEN A RATIFICATION VOTE.

[16] THE COURT: SO NO VOTE WAS ACTUALLY TAKEN BY SECRET BALLOT OR OTHERWISE?

[16] MR. BEESON: RIGHT, THAT'S WHAT I'M SAYING.

[16] THE COURT: AND MR. NETTO AT NO TIME TOLD MR. WOOLPERT THAT A VOTE WAS TAKEN BY SECRET BALLOT OR OTHERWISE.

[16] MR. BEESON: THERE'S A FLAT CONTRADICTION IN THE TWO DECLARATIONS YOU HAVE BEFORE YOU ON THAT POINT YOU HAVE BEFORE YOU, JUDGE WARE.

MR. WOOLPERT SAYS IN HIS DECLARATION THAT NETTO CALLED HIM BY TELEPHONE SOMEWHERE AROUND 4:00 OR 5:00 O'CLOCK IN THE AFTERNOON OF JULY 2ND AND SAID THAT THE AGREEMENT WAS RATIFIED.

MR. NETTO FLATLY SAYS THAT'S NOT TRUE, HE DID NOT CALL MR. WOOLPERT. HE DID

NOT AT ANY TIME TELL HIM THAT THE RATIFICATION HAD TAKEN PLACE.

ON THE CONTRARY, MR. NETTO'S ENTIRE COURSE OF ACTION WAS TO MAKE CLEAR, AS HE TOLD MR. WOOLPERT EARLY IN THE MORNING, THAT THERE WOULD HAVE TO BE A RETURN-TO-WORK AGREEMENT BEFORE HE WOULD SUBMIT THE TENTATIVE COLLECTIVE BARGAINING AGREEMENT FOR RATIFICATION.

YOU HAVE A FLAT FACTUAL CONFLICT ON THAT PARTICULAR POINT AND I DO NOT THINK THAT THIS IS GOING TO BE THE TIME OR PLACE NOR IS ANYBODY PREPARED FOR IT TO HAVE TESTIMONY FROM A WITNESS ON THIS APPLICATION FOR A RESTRAINING ORDER.

[17] THE COURT: IS MR. NETTO HERE?

[17] MR. BEESON: HE IS.

[17] THE COURT: IS MR. WOOLPERT HERE?

[17] MR. LEVINS: YES.

[17] MR. BEESON: BUT MY UNDERSTANDING IS THAT OBVIOUSLY WE WILL BE CONTROLLED BY WHATEVER YOU WANT TO HAVE HAPPEN HERE, BUT MY UNDERSTANDING IS THAT TESTIMONIAL EVIDENCE ON AN EX PARTE RESTRAINING ORDER APPLICATION IS NOT IN ACCORDANCE WITH THE RULES.

[17] THE COURT: WELL, I'LL TELL YOU WHERE I AM. I AM, AS YOU PUT YOUR FINGER ON IT, I'M AT A CIRCUMSTANCE WHERE I HAVE CONFLICTING DECLARATIONS.

LET ME ASK A QUESTION OF YOU, BECAUSE I DIDN'T FOLLOW THE SAME LINE OF QUESTIONING WITH YOU AND I DO WANT TO KNOW, WHAT IS THE POSITION OF THE UNION WITH RESPECT TO MR. NETTO'S AUTHORITY TO INDICATE RATIFICATION IF INDEED NO RATIFICATION HAD TAKEN PLACE? DOES HE HAVE THE AUTHORITY AS THE UNION'S AGENT TO SAY THAT I CONSIDER ON BEHALF OF THE UNION THE CONTRACT TO BE RATIFIED?

[18] MR. BEESON: ABSOLUTELY NOT. HE'S BEEN ON THE CONSTITUTION OF THE INTERNATIONAL. THERE HAS TO BE A SECRET BALLOT RATIFICATION BEFORE THE CONTRACT GOES INTO EFFECT AND FOR THE SAME REASON -

[18] THE COURT: WELL, HOW IS THE MAN—HOW IS THE GRANITE ROCK, THIS CASE, MANAGEMENT TO KNOW WHETHER OR NOT IT IS RATIFIED?

IS THERE ANY FORMAL NOTIFICATION PROCESS OR JUST A PHONE CALL?

[18] MR. BEESON: THERE'S NO FORMAL RATIFICATION PROCESS THAT IS ANYWHERE IN THE RECORD BEFORE YOU, AND QUITE FRANKLY, I KNOW OF NONE.

I WOULD STRONGLY SUSPECT THAT IT WOULD, IT WOULD BE UP TO THE PRACTICE OF THE PARTIES AS TO WHETHER THEY WANTED SOMETHING IN WRITING OR WHETHER A TELEPHONE CALL WOULD BE ADEQUATE.

[18] THE COURT: ALL RIGHT. SO IT COULD—SO IF I HAD A CIRCUMSTANCE, LET ME BE CYNICAL FOR A MOMENT, WHERE MR. NETTO CALLED AND SAID IT IS RATIFIED BUT LATER FIGURED OUT, WHOOPS, I SHOULD HAVE DONE SOMETHING ELSE, THAT WOULD BE CONSISTENT WITH THE FACTS I HAVE, AS CONSISTENT AS MR. WOOLPERT SAYING HE GOT THE CALL? I MEAN, IT COULD—THAT COULD HAVE HAPPENED SO FAR AS YOU KNOW. YOU'RE RELYING ON THE CREDIBILITY OF PEOPLE JUST LIKE I WOULD BE.

[19] MR. BEESON: YES.

[19] THE COURT: IS THERE ANY WAY TO KNOW WHETHER THIS PHONE CALL TOOK PLACE, ANY REPORT OF IT, ANYBODY ELSE PRESENT, ANY RECORDS, ANYONE WHO HE SAID I JUST GOT OFF THE PHONE WITH MR. WOOLPERT AND I TOLD HIM IT HADN'T BEEN RATIFIED OR ANY MEMOS OR ANYTHING?

[19] MR. BEESON: NO.

MR. NETTO WOULD HAVE TOLD IF IT HAD HAPPENED I'M SURE.

[19] THE COURT: NOW, YOU SAID, COUNSEL FOR THE UNION, DID YOU HAVE A CONVERSATION—WHEN WAS YOUR FIRST CONVERSATION WITH MR. NETTO AT THE DECLARATION OF THE EARLY MORNING NEGOTIATIONS?

[19] MR. BEESON: IT WAS AS SOON AS I GOT IN THE OFFICE AND MR. NETTO CALLED ME.

[19] THE COURT: WAS THAT ON TUESDAY AFTER, AFTER INDEPENDENCE HOLIDAY?

[20] MR. BEESON: THAT WOULD BE ON FRIDAY, THE 2ND OF JULY.

[20] THE COURT: SO YOU SPOKE WITH HIM ON THE DAY AFTER HE HAD FINISHED THE NEGOTIATIONS.

[20] MR. BEESON: THE DAY THAT HE CONCLUDED THE NEGOTIATIONS.

[20] MR. BEESON: NOW, THIS WAS AN ALL NIGHT SESSION?

[20] THE COURT: THE DAY AFTER THE ALL NIGHT SESSION.

[20] MR. BEESON: UH-HUH.

[20] THE COURT: AND SO YOU'RE IN A POSITION TO TELL US WHAT HE SAID WITH RESPECT TO HIS INTENT TO HAVE A CONTRACT RATIFIED?

[20] MR. BEESON: THERE'S NO QUESTION ABOUT IT. I REMEMBER VERY DISTINCTLY, AND I'LL REPRESENT TO THE COURT THAT HE CALLED ME SOMEWHERE AROUND 9:00 O'CLOCK. I WOULD LIKE TO THINK IT WAS BEFORE, BUT IT WAS SOMEWHERE IN THAT EARLY MORNING TIME.

[20] MR. MATHIASON: YOUR HONOR, IF I COULD PUT OUT A CLARIFICATION. WE HAD CONVERSATIONS THAT HAPPENED WITH OUR CLIENT AND IF IT'S UNDERSTOOD THAT WE'RE WAIVING THE PRIVILEGE FOR THE PURPOSE OF THIS PROCEEDING. I THINK WE'RE PREPARED TO DO THAT. OBVIOUSLY MR. BEESON'S CLIENT CAN WAIVE THE PRIVILEGE.

[21] THE COURT: WELL, SINCE MR. BEESON I RECOGNIZE HIM TO BE A SENIOR MEMBER OF THE BAR. HE'S BEEN BEFORE ME BEFORE. I KNOW HE KNOWS THE LAW WELL. I'M NOT ASKING ABOUT ANY CONFIDENTIAL COMMUNICATIONS NECESSARILY. I'M JUST TRYING TO FIGURE OUT—I ONLY ASKED IF YOU WERE IN A POSITION TO BE A PERSON TO TESTIFY ABOUT WHAT HE SAID WITH RESPECT TO HIS STATE OF INTENT WITH RESPECT TO RATIFICATION. IT SOUNDS LIKE THAT WAS THE SUBJECT MATTER OF THE CONVERSATION YOU HAD WITH HIM.

[21] MR. BEESON: IT WAS.

[21] THE COURT: THEN THERE WAS A PERIOD OF TIME BETWEEN THAT END OF THE NEGOTIATIONS AND A TIME WHEN HE NEXT SPOKE WITH MR. WOOLPERT. IS THAT DENIED? WHAT DATE DID THAT CONVERSATION ALLEGEDLY—

[21] MR. BEESON: THE SAME DAY, JULY THE 2ND.

[21] MR. LEVINS: THERE'S A CONVERSATION APPROXIMATELY 4:00, 5:00 P.M. BETWEEN MR. NETTO AND MR. WOOLPERT ON THE 2ND.

[21] THE COURT: WHEN HAD THEY ENDED?

[21] MR. LEVINS: ABOUT 4:00 O'CLOCK IN THE MORNING OF JULY 2ND.

[22] THE COURT: SO 4:00 O'CLOCK A.M. WAS THE END OF THE NEGOTIATIONS AND 4:00 O'CLOCK P.M. IS A PHONE CALL ALLEGEDLY DISCUSSING THAT RATIFICATION HAD TAKEN PLACE?

[22] MR. LEVINS: EXACTLY.

[22] THE COURT: AND THERE'S, TO YOUR UNDERSTANDING, NO RECORD OF ANY VOTE HAVING BEEN TAKEN ON THE DATE OF JULY 2ND?.

[22] MR. BEESON: THERE'S NO RECORD OF IT AND IT DID NOT HAPPEN. HE CALLED ME AND HE ASKED ME TO DRAFT A COUNTER PROPOSAL ON THE RETURN-TO-WORK AGREEMENT. HE TOLD ME HE WANTED THAT

BECAUSE THAT HAD TO BE AGREED TO BEFORE THERE WOULD BE ANY RATIFICATION VOTE.

[22] THE COURT: AND THERE WAS SOME CONVERSATION ABOUT REMOVING THE PICKETS?

[22] MR. BEESON: OH, YES, HE AGREED TO DO THAT AND MR. WOOLPERT ASKED HIM TO DO THAT ACCORDING TO THE DECLARATION BECAUSE MR. WOOLPERT EXPECTED TO HAVE A 4TH OF JULY EVENT AT ONE OF HIS INDUSTRIAL LOCATIONS AND HE DIDN'T WANT TO HAVE IT UPSET BY A LABOR DISPUTE. AND GEORGE WAS PERFECTLY WILLING TO PULL THE PICKETS BECAUSE HE THOUGHT BECAUSE THEY HAD AGREED ON A CONTRACT THEY WOULD BE ABLE TO TAKE CARE OF THE RIGHT TO WORK AGREEMENT AND THE WHOLE THING WOULD BE OVER.

[23] THE COURT: LET ME GO BACK OVER HERE.

I'M IN A PRETTY DIFFICULT SPOT, WOULDN'T YOU AGREE, BECAUSE IF I TAKE YOUR SIDE, I WOULD BE TAKING THE SIDE OF SAYING THAT THIS THING IS OVER, THERE IS A CONTRACT, IT'S BEEN RATIFIED, IT IS NO LONGER SUBJECT TO ANY UNION ACTION WHEN INDEED I'M FACED WITH COUNSEL FOR THE UNION SAYING THERE HAS BEEN NO VOTE, THERE HAS BEEN NO RATIFICATION, THE INTERNATIONAL UNION REQUIRES A SECRET BALLOT KIND OF PROCEDURE, IT HAS BEEN FOLLOWED.

I WOULD TRY TO ENFORCE UPON THE UNION SOMETHING THAT THE UNION DOESN'T RECOGNIZE AS HAVING TAKEN PLACE AND INDEED I'M BEING TOLD THAT IT, IN FACT, DID NOT TAKE PLACE. THIS IS NOT THE CASE OF THE VOTE THAT IS BEING RECAST IN SOME OTHER STATE, IT'S JUST NEVER BEEN SUBMITTED.

[23] MR. LEVINS: THEY'RE SAYING IT NOW AND IT'S NOT TRUE AND MR. WOOLPERT CAN TESTIFY TO EXACTLY WHAT HE WAS TOLD.

[23] THE COURT: BUT IF I'M TO GRANT INJUNCTIVE RELIEF, IT SOUNDS TO ME LIKE BEFORE I DO THAT, I WOULD HAVE TO HAVE A TRIAL, FIND OUT THAT MR. WOOLPERT IS TELLING THE TRUTH, MR. NETTO IS NOT TELLING THE TRUTH AND MAKE A FINDING BASED UPON THAT FACTUAL MATTER.

THIS COMES TO ME TODAY BY WAY OF A PRELIMINARY INJUNCTION SAYING THERE IS NO DISPUTE, WE'RE ENTITLED TO JUDGMENT AS A MATTER OF LAW, AND THE EQUITIES FAVOR THIS SIDE, WE NEED INJUNCTIVE PROTECTION THAT PROTECTS SOMETHING WE ALREADY HAVE WHICH IS THIS CONTRACT AND IT SEEMS TO ME AS THOUGH WE'RE NOT QUITE THERE YET.

[24] MR. LEVINS: WELL, YOUR HONOR, WE'RE PREPARED TO PUT WITNESSES ON THE STAND TODAY. IN FACT, WE WOULD HAVE BEEN PREPARED TO DO THAT IRRESPECTIVE OF THIS LATE CONFLICT IN THE TESTIMONY BECAUSE NORRIS LAGUARDIA REQUIRES IT.

AND SO WE WERE PREPARED TO HAVE MR. WOOLPERT TESTIFY, AND I THINK THAT MR. BEESON KNEW THAT WE WOULD BE PREPARED TO DO THAT AND THAT'S WHY MR. NETTO IS HERE.

[24] THE COURT: I DIDN'T DO THIS. I WOULD HAVE TO HAVE A WAIVER. I CAN ACCELERATE THE TRIAL ON THE MERITS OF THE CASE TO A HEARING ON AN INJUNCTION UNDER THE RULES, BUT I WOULD—ORDINARILY DUE PROCESS BEING DUE HERE GIVE NOTICE OF THAT INTENT BEFORE I WOULD IMPOSE THAT ON YOU.

[24] MR. BEESON: WE HAVE CITED CASES, YOUR HONOR, INCLUDING A NINTH CIRCUIT CASE THAT A RESTRAINING ORDER SHOULD NOT ISSUE AND ON AN EX PARTE OR EVEN A PRELIMINARY INJUNCTION CONTEXT WHERE THERE'S A CONFLICT OF FACT THAT CANNOT BE RESOLVED WITHOUT AN EVIDENTIARY HEARING.

[25] THE COURT: RIGHT, BUT I'M SAYING I CAN HAVE THAT HEARING THIS AFTERNOON AND YOU CAN BE DONE WITH THIS WHOLE PROBLEM ONE WAY OR THE OTHER, BUT I WOULD HAVE TO HAVE YOUR WAIVER BECAUSE I HAVEN'T GIVEN YOU ANY NOTICE OF IT. IT SOUNDS LIKE THE PLAINTIFF HERE IS WISHING TO HAVE IT AND I DON'T KNOW OF ANY OTHER WITNESSES WHO MIGHT BE MORE IMPORTANT TO IT THAN MR. NETTO AND WOOLPERT. THEY'RE BOTH HERE.

[25] MR. BEESON: IT'S VERY OBVIOUS, AS FAR AS WE'RE CONCERNED, THAT THE MEMBERS WHO ARE THERE WOULD BE PERCIPIENT WITNESSES WHO WOULD BE VERY IMPORTANT.

[25] THE COURT: YOU MEAN PEOPLE IN THE ROOM OTHER THAN THOSE TWO?

[25] MR. BEESON: PRECISELY.

[25 THE COURT: WHO ELSE WAS THERE?

[25] MR. BEESON: YOU'RE TALKING ABOUT THE TELEPHONE CALL?

[25] THE COURT: I'M TALKING ABOUT THE ALL NIGHT MEETING WHERE THEY CAME TO SOME CONCLUSION SAYING THAT WE'RE GOING TO GO OUT AND GET RATIFICATION. THAT'S IMPORTANT TO PUT US IN CONTEXT AND WHOEVER KNOWS WITH THE 4:45 TELEPHONE CALL. IS THERE ANYBODY OTHER THAN THE TWO PEOPLE?

[26] MR. BEESON: THE EVIDENCE I'M ALLUDING TO BE WOULD BE MEMBERS WHO WERE AT THE MEETING THAT MORNING WHO WILL TESTIFY THAT NO RATIFICATION TOOK PLACE.

[26] THE COURT: WELL, I UNDERSTAND THAT THAT IS THE POSITION TAKEN BY THE UNION AND IT DOESN'T SEEM TO ME THAT THE PLAINTIFF IS TAKING THE POSITION THAT THERE WAS, THERE WAS RATIFICATION IN THE FORM OF A SECRET BALLOT VOTE.

THE PLAINTIFF'S POSITION IS THAT THEY WERE INFORMED BY SOMEONE WHO WAS IN A POSITION OF THE AGENT THAT IT WAS RATIFIED AND THEY WOULD WISH ME TO TAKE THAT AS RATIFICATION.

NOW, AS A MATTER OF LAW, I'M NOT IN A POSITION OF KNOWING WHETHER OR NOT I SHOULD DO THAT AT THIS POINT, BUT I WAS TRYING TO SEE WHETHER I COULD ACCELERATE THIS PROBLEM TO THE POINT OF DECIDING WHAT HAPPENED IN THAT PHONE CALL IF THAT WAS ONLY AGAINST TWO PEOPLE, WHETHER OR NOT THE VOTE WAS TAKING PLACE OR NOT BECAUSE WHAT ELSE IS LEFT OF THIS LAWSUIT IF THE COURT FINDS THAT THERE WAS NO CONVERSATION? IS THERE ANYTHING LEFT OF YOUR CASE?

[27] MR. LEVINS: NO CONVERSATION AT 4:45. THE COURT: YES. DO YOU HAVE ANYTHING LEFT OF YOUR CASE?

[27] MR. LEVINS: WE HAVE TO ESTABLISH THAT THERE WAS A COLLECTIVE BARGAINING AGREEMENT AND WE CAN ESTABLISH THAT BASED UPON ON THE STATEMENT OF RATIFICATION BY MR. NETTO AND WE'RE NOT CONCEDING THERE WAS NOT A VOTE THAT MORNING.

[27] THE COURT: STAY WITH ME. I'M ASKING YOU A STRAIGHT QUESTION.

IF I TAKE EVIDENCE FROM MR. NETTO AND WOOLPERT, AND I FIND I BELIEVE MR. NETTO, I DON'T BELIEVE MR. WOOLPERT, THERE WAS NO COMMUNICATION, IS THERE ANYTHING LEFT OF YOUR LAWSUIT?

[27] MR. LEVINS: THAT IS AN IMPORTANT FACT THAT WE HAVE TO PROVE THAT THERE WAS AN EFFECTIVE COLLECTIVE BARGAINING AGREEMENT WITH A NO STRIKE CLAUSE IN IT.

[27] THE COURT: IS THERE ANYTHING LEFT OF YOUR CASE?

[27] MR. MATHIASON: YOUR HONOR, IF I COULD ADDRESS THAT. THERE IS ABSOLUTELY A PART OF THE CASE LEFT. THE INJUNCTIVE RELIEF MAY BE AN ISSUE, BUT THE ONLY REMAINING ISSUES ARE CALLED PERMISSIVE ISSUES.

[28] THE COURT: WHICH WOULD BE WHAT?

[28] MR. MATHIASON: UNDER THE NATIONAL LABOR RELATIONS ACT THERE'S CERTAIN ISSUES THAT YOU CAN HAVE AN IMPASSE ON, WHERE YOU DON'T—YOU CAN LEGITIMATELY NOT REACH AN AGREEMENT AND THERE'S OTHER ISSUES THAT ARE PERMISSIVE, AND IN OTHER WORDS, THE OTHER PARTY CAN BRING THEM UP BUT IF THEY SAY I DON'T WANT TO TALK ABOUT THAT, I DON'T WANT TO AGREE, IT'S PERMISSIVE. IT CAN'T STOP IT FROM COMING TOGETHER. THE ISSUES IN THAT WORK AGREEMENT ARE ALL PERMISSIVE. ONE PARTY OR THE OTHER CAN

SAY I DON'T WANT TO DISCUSS IT ANY FURTHER AND WE'RE DONE AND IN THAT CASE ALL OF THE OTHER PIECES WOULD COME TOGETHER BECAUSE THERE'S NO DISPUTE THAT ON THE COLLECTIVE BARGAINING AGREEMENT ISSUES THERE'S FULL AND COMPLETE AGREEMENT.

[28] THE COURT: WELL, I'M SAYING THE WORDS BUT I DON'T SEEM TO BE GETTING BACK WHAT I CONSIDER TO BE ANSWERS.

IF I—I'M TRYING TO GET YOUR POSITION. IF I DECIDE MR. WOOLPERT IS NOT TELLING THE TRUTH, DO YOU STILL HAVE CLAIMS BEFORE THIS COURT THAT YOU WISH TO PURSUE?

[29] MR. MATHIASON: WE'RE SAYING THAT THE AGREEMENT WOULD EXIST ON A PERMISSIVE BASIS.

ONE OF THE ELEMENTS IS RATIFICATION WITH REGARD TO THE UNDERLYING CONTRACT AND IF YOU FIND, WHICH WE BELIEVE ONCE YOU HEAR THE EVIDENCE BUT NO SUCH STATEMENT WAS MADE BY MR. NETTO AND FURTHER THAT IT DIDN'T HAPPEN, THEN WE WOULD NOT HAVE THE NECESSARY ELEMENT OF RATIFICATION.

[29] THE COURT: AND WOULD THERE BE ANYTHING LEFT OF YOUR LAWSUIT? THAT'S WHAT I'M TRYING TO FIND OUT, YES OR NO?

[29] MR. MATHIASON: AT THIS TIME THERE WOULDN'T. WHAT I'M SAYING IS THAT THE NATIONAL LABOR RELATIONS BOARD COULD GO AHEAD AND MANDATE A CONTRACT BECAUSE IT'S PERMISSIVE ITEMS. ONCE THEY MANDATE IT, WE CAN TAKE THAT BACK TO COURT AND SEEK DAMAGES ON IT OR THERE WOULD BE CONCRETE JURISDICTION ON THE PART OF THE COURT.

[29] THE COURT: I'M TAKING THAT COMPLICATED ANSWER TO BE IF I DECIDED THAT MR. WOOLPERT IS NOT TELLING THE TRUTH, THERE MAY BE OTHER PROBLEMS BUT THERE WOULDN'T BE THIS LAWSUIT.

I'M GOING BACK OVER TO YOU. DO YOU AGREE WITH THAT OR NOT?

[29] MR. BEESON: I AGREE WITH THAT.

[30] THE COURT: ARE YOU WILLING TO WAIVE NOTICE AND ALLOW THE COURT TO ADJUDICATE THIS PROBLEM THIS AFTERNOON?

[30] MR. BEESON: I WILL ANSWER THAT WITH A YES OR NO IN JUST A MOMENT, BUT I WANT TO MAKE CLEAR BEFORE I DO THAT THAT IRRESPECTIVE OF HOW I ANSWER THAT, THERE IS STILL SOMETHING LEFT OF OUR DEFENSE NOT RELATED TO RATIFICATION.

AND, IN OTHER WORDS, IF WE DEFEND ON THE GROUND IN ADDITION TO THE FACT THAT THERE WAS NO RATIFICATION THAT EVEN IF THERE WAS, EVEN IF THERE WAS AN

AGREEMENT THAT THERE IS NOTHING TO ARBITRATE AND IN A SITUATION UNDER THE BOISE MARKET DECISION IN THE SUPREME COURT WHERE YOU CANNOT ORDER ARBITRATION WITH RESPECT TO THE UNION THAT STANDS BEFORE YOU, THEN YOU CANNOT STOP A STRIKE. THE NORRIS LAGUARDIA ACT DEPRIVES THIS COURT OF JURISDICTION TO ENJOIN A STRIKE OF WHICH THERE IS NO ARBITRATION POSSIBLE UNDER THE CONTRACT.

THE MATTERS IN DISPUTE HERE, EVEN TAKING THE EMPLOYERS' VIEW OF THIS CASE, ARE NOT SUBJECT TO ARBITRATION BETWEEN THE UNION AND THE EMPLOYER UNDER THE CONTRACT IF IT WERE TO BE FOUND EXISTENT.

[30] THE COURT: ALL RIGHT. LET ME SEE IF I CAN FOLLOW THAT.

[31] MR. BEESON: YEAH.

[31] THE COURT: IN OTHER WORDS, YOUR POSITION IS THAT EVEN IF THIS WERE A CONTRACT THAT WAS RATIFIED UNDER THE TERMS OF THE CONTRACT ITSELF UNDER THE TERMS THE BACK-TO-WORK ORDER OR BACK-TO-WORK AGREEMENT, NEITHER OF THOSE ARE SUBJECT TO BE ENFORCED THROUGH ARBITRATION?

[31] MR. BEESON: BY THIS UNION AND THIS EMPLOYER, THAT'S CORRECT.

[31] THE COURT: WHY?

[31] MR. BEESON: TWO PRINCIPLE ISSUES THAT ARE A SUBJECT OF THE DISPUTE THAT THE EMPLOYERS SAY ARE SUBJECT OF THE ARBITRATION. ONE OF THOSE ISSUES IS WHETHER OR NOT THERE COULD BE DISCIPLINARY ACTION AGAINST STRIKING EMPLOYEES FOR THEIR CONDUCT DURING THE STRIKE, THAT THEY ENGAGED IN MISCONDUCT AND THEY CAN BE FIRED. THAT'S ONE ISSUE.

THAT IS A FALSE ISSUE, HOWEVER, BECAUSE WE HAVE AGREED TO THAT. WE AGREED THAT ANY DISCIPLINARY ACTION CAN BE SUBMITTED TO ARBITRATION. SO THAT ARGUMENT THAT MR. LEVINS HAS ALLUDED TO EARLIER IS NOT BEFORE THE COURT. THERE WAS NO DISPUTE BETWEEN THE PARTIES.

THE SECOND AND MORE COMPLICATED ISSUE OR DISPUTE IS THAT THE UNION IS SAYING TO THE EMPLOYER, WE WANT YOU TO TAKE ALL OF OUR EMPLOYEES BACK TO WORK AND WE WANT YOU TO DROP ALL LAWSUITS AGAINST US, AND WE ALSO WANT YOU, THE EMPLOYER, NOT TO TAKE ANY ACTION AGAINST OTHER UNIONS WHO SUPPORTED OUR STRIKE BY HAVING THEIR MEMBERS HONOR OUR PICKET LINES.

OKAY. NOW THAT CONTROVERSY, THE EMPLOYER SAYS HE WON'T DO THAT AND WE SAY YOU SHOULD THAT CONTROVERSY WOULD BE SUBJECT TO ARBITRATION ONLY

BETWEEN THE OTHER UNIONS AND THIS EMPLOYER WOULD BE ALLEGED, THE EMPLOYER WOULD BE EXPLAINING ABOUT VIOLATIONS OF THE CONTRACT THAT HE HAD WITH THE OTHER UNIONS SAYING THAT YOU DID NOT HAVE THE RIGHT TO HONOR THE PICKET LINE.

[32] THE COURT: SO YOU TAKE THE POSITION THAT I HAVE TO DISMISS IT?

[32] MR. BEESON: YES.

[32] THE COURT: ALL RIGHT. SO I UNDERSTAND THAT. WHAT ELSE?

[32] MR. BEESON: THAT'S ALL I NEED TO TALK ABOUT, AND I DON'T THINK THERE IS ANYTHING ELSE ALTHOUGH IT GETS MORE COMPLICATED BECAUSE WITHOUT GETTING INTO THE DETAILS AT ALL, THE NEGOTIATIONS ON THE BACK-TO-WORK AGREEMENT HAVE CONTINUED ON UNTIL THIS VERY DAY AND THE ISSUES HAVE SPREAD OUT.

[33] THE COURT: NOW, LET ME ASK THIS AS A FINAL QUESTION, I'M NOT SURE I'M GOING TO DO IT, BUT I WANT TO KNOW.

IT SOUNDS TO ME LIKE THE PLAINTIFF IS WILLING TO PERMIT THE COURT IN THE CONTEXT OF THIS HEARING ON THIS INJUNCTIVE RELIEF TO HEAR THE MATTER ON THE MERITS AND DECIDE IT ON THE MERITS. ARE YOU WILLING TO DO THAT ON BEHALF OF THE DEFENDANTS?

[33] MR. BEESON: WELL, I'M CERTAINLY WILLING TO PUT MR. NETTO ON THE STAND TO COUNTER ANY EVIDENCE THAT IS—OR TESTIMONY THAT IS GIVEN BY MR. WOOLPERT. I THINK THAT WILL GIVE YOU AN OPPORTUNITY TO EVALUATE ONE OF THE ISSUES, THE IMPORTANT ISSUE AND WHETHER THERE WAS A STATEMENT MADE TO MR. WOOLPERT THAT RATIFICATION HAD TAKEN PLACE.

WE HAVE OTHER THINGS LEFT TO DEFEAT THE RESTRAINING ORDER, HOWEVER, APART FROM THAT NO MATTER HOW THAT DECISION IS MADE.

[33] THE COURT: IF I MODIFIED MY QUESTION WHETHER OR NOT WE CAN PROCEED THEN WE WOULD BIFURCATE OFF AND TRY AT ANOTHER TIME ANY REMAINING ISSUES.

SO IF I DECIDE, NOT THAT I WOULD, BUT IF I DECIDE AGAINST GRANITE ROCK—BECAUSE I HAVEN'T HEARD ANYTHING AT THIS POINT, I HAVE READ THIS STUFF, I HAVEN'T HEARD THE PEOPLE—IF I DECIDE AGAINST GRANITE ROCK, THERE PERHAPS WOULDN'T BE ANY NECESSITY FOR FURTHER PROCEEDINGS.

IF I DECIDE AGAINST THE UNION, YOU WANT TO MAKE SURE THAT THOSE FURTHER PROCEEDINGS, YOU HAVE AN OPPORTUNITY TO TAKE DISCOVERY AND DO OTHER THINGS BEFORE WE GO FORWARD.

[34] MR. BEESON: YES, THE OTHER PROCEEDINGS ARE ISSUES OF LAW THAT CAN BE DETERMINED WITHOUT NECESSITY OF AN EVIDENTIARY HEARING.

[34] THE COURT: ALL RIGHT. ANYTHING FURTHER YOU WANT TO ADD TO THIS BEFORE I GIVE YOU A RULING?

[34] MR. LEVINS: WELL, UM, YOU DIDN'T ASK BUT CLEARLY WE BELIEVE THAT THERE ARE BELIEVABLE ISSUES THAT THE AMNESTY ISSUE IS A GRIEVABLE ISSUE AND WE HAVE THE—IT WAS COMPLETE AUTO TRANSIT AND CLEARLY AMNESTY ISSUES ARE GRIEVABLE AND ARBITRABLE ISSUES AND I FIND IT INTERESTING THAT MR. BEESON ON THE ONE HAND SAYS THERE'S NO BACK-TO-WORK AGREEMENT AND ON THE OTHER HAND SAYS THERE'S SOME KIND OF AGREEMENT WITH REGARD TO HOW WE'RE GOING TO HANDLE AMNESTY. I DON'T THINK HE CAN HAVE IT BOTH WAYS.

WE HAVE GRIEVABLE ISSUES WITH REGARD TO AMNESTY AND WE HAVE GRIEVABLE ISSUES UNDER THE CEDAR CASE BECAUSE THIS UNION IS, AS MR. BEESON ADMITTED, THIS UNION IS ATTEMPTING TO FORCE GRANITE ROCK TO GIVE UP ITS RIGHT TO HAVE DISPUTES RESOLVED BY ARBITRATION, ALBEIT WITH A DIFFERENT UNION, AND THAT'S WHAT THEY'RE SAYING THEY'RE STRIKING ABOUT.

AND IF YOU LOOK AT THE CEDAR CASE, THE CEDAR CASE CLEARLY PROHIBITS THAT. AND

IN THE CEDAR CASE THE COURT FOUND IT IMPORTANT THAT BECAUSE THE PURPOSE OF THE. STRIKE WAS TO COMPEL CEDAR, THE EMPLOYER, TO CONCEDE ON AN ARBITRABLE ISSUE, ALBEIT WITH RESPECT TO A DIFFERENT UNION, THEY WERE ADJOINING CAUSE, AND THEREFORE, THAT WAS AN ARBITRABLE ISSUE AND HE RAISED ANOTHER ISSUE TODAY AND THAT WAS WHETHER WE COULD USE THESE NONUNION TRUCKS OR NOT AND WHY COULDN'T WE USE THEM. THE ONLY REASON IS BECAUSE THERE'S A COLLECTIVE BARGAINING AGREEMENT SAYING THAT WE CAN'T, OTHERWISE WE CAN USE THEM.

HE'S NOT ONLY CONCEDING THERE'S A COLLECTIVE BARGAINING AGREEMENT, HE'S CONCEDING THERE'S AN ARBITRABLE ISSUE.

[35] THE COURT: VERY WELL. I'M GOING TO UNDER RULE 65 OF THE RULES OF CIVIL PROCEDURE ORDER THE CONSOLIDATION OF THIS HEARING WITH THE TRIAL ON THE MERITS ADVANCED TO TODAY'S DATE WITH THE COURT ALLOWING AN OPPORTUNITY TO BOTH SIDES, SHOULD THE CONCLUSION OF TODAY'S HEARING LEAVE OPEN ISSUES FOR FURTHER TRIAL PROCEEDINGS. RULE 65(A)(2) PROVIDES THAT THIS IS TO BE CONSTRUED SO AS TO SAVE THE PARTIES ANY RIGHTS THAT THEY MAY HAVE TO TRIAL BY JURY.

MY UNDERSTANDING OF ALL OF THE ACTIONS THAT ARE BEFORE THIS COURT WOULD BE TRIED TO THE COURT SITTING WITHOUT A JURY. SO I'M NOT DEPRIVING

ANYONE OF THE RIGHT TO A JURY TRIAL ON ANY OF THE MATTERS THAT ARE BEFORE THE COURT.

THEREFORE, HAVE A SEAT. AND GRANITE ROCK CALL YOUR WITNESS.

[36] MR. LEVINS: YOUR HONOR, CAN WE HAVE A FIVE-MINUTE BREAK.

[36] THE COURT: I'LL TELL YOU, THE REASON I'M BEING CAREFUL ABOUT THE TIME IS THAT IT'S ALMOST 3:00 O'CLOCK NOW AND I BROUGHT MY WHOLE STAFF IN FROM VACATION TO BE HERE FOR YOU.

MS. RODRIGUEZ SAYS IT'S OKAY FOR US TO TAKE FIVE MINUTES.

(WHEREUPON, A RECESS WAS TAKEN.)

[36] THE COURT: ARE YOU READY TO PROCEED?

[37] MR. LEVINS: YES, YOUR HONOR.

[37] THE COURT: CALL YOU YOUR FIRST WITNESS.

[37] MR. LEVINS: WE CALL MR. BRUCE WOOLPERT.

[37] THE COURT: COME ALL OF THE WAY FORWARD HERE AND BE SWORN BY THE CLERK.

[37] THE CLERK: RAISE YOUR RIGHT HAND, PLEASE.

BRUCE WOOLPERT,

BEING CALLED AS A WITNESS ON BEHALF OF THE PLAINTIFF, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

[37] THE WITNESS: YES, I DO.

[37] THE CLERK: BE SEATED, PLEASE. IF YOU CAN STATE YOUR FILE NAME AND SPELL YOUR LAST NAME FOR THE RECORD, PLEASE.

[37] THE WITNESS: IT'S BRUCE W. WOOLPERT. W-O-O-L-P-E-R-T.

[37] THE COURT: MAKE SURE THE MICROPHONE IS ON, MR. DAVIS.

GO AHEAD, COUNSEL.

DIRECT EXAMINATION

BY MR. LEVINS:

[37] Q. MR. WOOLPERT, GOOD AFTERNOON. WHAT IS YOUR POSITION AT GRANITE ROCK?

[37] A. I'M THE PRESIDENT AND CHIEF EXECUTIVE OFFICER OF GRANITE ROCK.

[38] Q. AND WHAT IS GRANITE ROCK?

[38] A. GRANITE ROCK IS A CONSTRUCTION MATERIAL SUPPLIER. WE SUPPLY READY MIX CONCRETE, AGGREGATE, OTHER KIND OF CONSTRUCTION MATERIALS AND WE'RE ALSO A HEAVY ENGINEERING CONTRACTOR.

[38] Q. NOW, YOU PROVIDED A DECLARATION IN THIS CASE PREVIOUSLY; IS THAT CORRECT?

[38] A. YES, I DID.

[38] Q. AND YOU'VE REVIEWED THAT DECLARATION?

[38] A. YES, I DID.

[38] Q. AND ARE THE STATEMENTS MADE IN THAT DECLARATION TRUE AND CORRECT?

[38] A. YES, THEY ARE.

[38] Q. I'M GOING TO COVER SOME AREAS THAT MAY ALREADY BE COVERED IN THE DECLARATION FOR THE PURPOSE OF THE ISSUE THAT THE COURT WAS MOST INTERESTED IN.

DIRECTING YOUR ATTENTION TO APRIL OF 2004, DID YOU HAVE A COLLECTIVE—DID GRANITE ROCK HAVE A COLLECTIVE BARGAINING AGREEMENT WITH TEAMSTERS LOCAL 287?

[38] A. YES, WE DID.

[38] Q. AND WHEN DID THAT CONTRACT EXPIRE?

[38] A. IT EXPIRED AT MIDNIGHT APRIL 30TH.

[38] Q. AND WHAT EMPLOYEES WERE IN THAT BARGAINING UNIT?

[39] A. READY MIX DRIVERS AT OUR SAN JOSE CONCRETE PLANT ON BERRYESSA ROAD.

[39] Q. NOW, WERE YOU INVOLVED IN NEGOTIATING FOR THE COLLECTIVE BARGAINING AGREEMENT TO TAKE OVER AFTER THAT ONE?

[39] A. YES, I WAS.

[39] Q. WHAT WAS YOUR ROLE IN THAT REGARD?

[39] A. SHIRLEY OW AND I WERE THE TWO TEAM MEMBERS FOR THE COMPANY AND IN THOSE NEGOTIATIONS.

[39] Q. AND DID YOU ATTEND ALL OF THE NEGOTIATIONS?

[39] A. YES, I DID.

[39] Q. AND WHEN DID THE NEGOTIATIONS BEGIN?

[39] A. ON MARCH 23RD.

[39] Q. AND NOW I WANT TO DIRECT YOUR ATTENTION TO THE EVENING OF JULY 1 OF 2004. DID YOU ATTEND A NEGOTIATION SESSION THAT DAY?

[39] A. YES, I DID.

[39] Q. AND, IN FACT, YOU HAD ATTENDED AN EARLIER ONE IN THE MORNING; IS THAT CORRECT?

[39] A. YES, THERE WAS ONE IN THE MORNING ON A DIFFERENT CONTRACT AND IN THE EVENING WE MET WITH MR. NETTO. WE ALSO DISCUSSED THE SAN JOSE CONCRETE AGREEMENT AT THE END OF THAT OTHER MEETING.

[39] Q. WHO WAS PRESENT AT THE JULY 1 NEGOTIATIONS?

[40] A. IN THE EVENING?

[40] Q. YES.

[40] A. MS. OW AND ME FOR THE COMPANY, GEORGE NETTO, CHRIS NOVAK AND BRIAN DRISCOLL WHO ARE TWO EMPLOYEE OBSERVERS FOR THE UNION.

[40] Q. AND WHAT TIME DID THOSE NEGOTIATIONS BEGIN, THE 287 NEGOTIATIONS?

[40] A. ABOUT 9:20, 9:25.

[40] Q. WHEN DID THOSE NEGOTIATIONS CONCLUDE?

[40] A. JUST A LITTLE BIT BEFORE 4:00 O'CLOCK IN THE MORNING THE NEXT DAY, JULY 2ND.

[40] Q. AND SO THESE WERE NEGOTIATIONS THAT WENT THROUGH THE NIGHT?

[40] A. YES.

[40] Q. AND WHAT WAS THE STATUS OF THE NEGOTIATIONS AT APPROXIMATELY 3:30, 4:00 O'CLOCK THE FOLLOWING JULY 2ND?

[40] A. WE HAD REACHED AGREEMENT AND MR. NETTO HAD AGREED TO TAKE THE CONTRACT OUT FOR RATIFICATION.

[40] Q. HAD RATIFICATION BEEN DISCUSSED BEFORE JULY 2ND?

[40] A. YES, WE DISCUSSED IT WITH EACH OF THE PROPOSALS MADE TO THE UNION STARTING AT 9:25 WITH THE VERY FIRST PROPOSALS THROUGHOUT THE EVENING EACH NEW PROPOSAL WE INDICATED TO MR. NETTO THAT ALL OF OUR PROPOSALS THAT DAY WERE SUBJECT TO RATIFICATION THE NEXT MORNING BY 6:00 A.M.

BY 3:30 IN THE MORNING, 6:00 O'CLOCK LOOKED VERY CLOSE SO MR. NETTO ASKED IF THE 6:00 O'CLOCK RATIFICATION DEADLINE COULD BE POSTPONED TO 9:00 O'CLOCK, AND WE AGREED TO THAT.

[41] Q. WAS ONE OF THE CONCERNS THAT YOU HAD THAT THE CONTRACT BE CONCLUDED IN TIME FOR AN EMPLOYEE TO TAKE ADVANTAGE OF THE JULY 4 HOLIDAY PAY?

[41] A. YES, AND THAT THEY BE BACK TO WORK ON FRIDAY, SO THAT THEY GET FRIDAY AS A WORK DAY AND BY WORKING ON FRIDAY THEY WOULD ALSO QUALIFY FOR MONDAY AS A HOLIDAY PAY.

[41] Q. DID—WERE THERE ANY OTHER DISCUSSIONS WITH REGARD TO—WELL, WITHDRAW THAT.

WERE THERE ANY DISCUSSIONS WITH REGARD TO AFTER YOU HAD REACHED THIS AGREEMENT, THE MORNING OF JULY 2ND, WERE THERE ANY DISCUSSIONS WITH REGARD TO PICKETS AND WHETHER THE PICKETS WOULD CONTINUE AT THE JOB SITE?

[41] A. YES.

[41] Q. AND WHAT WAS STATED IN THAT REGARD AND BY WHOM?

[41] A. I ASKED MR. NETTO IF HE WOULD REMOVE THE PICKETS BY 6:00 A.M. IN THE MORNING BECAUSE OUR FIRST SHIFT IN VARIOUS PARTS OF THE COMPANY THAT HE WAS PICKETING VARIOUS LOCATIONS, THAT THOSE FIRST SHIFTS WOULD BEGIN AT 7:00 AND SO IF THE PICKETS WERE REMOVED BY 6:00 A.M., PEOPLE COULD GO TO WORK BY 7:00.

[42] Q. DID YOU EVER RAISE ANY ISSUES ABOUT A JULY 4 PICKET OR ANYTHING LIKE THAT?

[42] A. NO.

[42] Q. NOW, UM, WAS THE ISSUE OF A BACK-TO-WORK AGREEMENT DISCUSSED THAT MORNING ON JULY 2ND?

[42]A. YES.

[42] Q. AND HOW DID THAT COME UP? WHO SAID WHAT?

[42] A. WELL, AFTER WE HAD REACHED AGREEMENT AND WE HAD TALKED ABOUT MOVING THE RATIFICATION AGREEMENT FROM 6:00 IN THE MORNING UNTIL 9:00 IN THE MORNING, MR. NETTO SAID WE NEED TO GET A WORK AGREEMENT AND WE STARTED TALKING ABOUT, AND THIS WAS BOTH DIRECTIONS, THAT WE WOULD MIMIC OR COPY THE PROCESS THAT WE USED WITH THE GILROY CONCRETE AGREEMENT IN PREVIOUS YEARS. AND, IN FACT, MR. NETTO COMMENTS THAT THAT PROCESS WHICH HE THOUGHT WAS RATIFICATION FIRST PEOPLE GO BACK TO WORK AND THE WORK AGREEMENT DONE SOME TIME AFTER, THAT THAT PROCESS HAD WORKED SATISFACTORILY FOR HIM AND WE AGREE.

[42] Q. AND YOUR AGREEMENT WAS THAT PROCESS WOULD APPLY WITH RESPECT TO THE NEGOTIATIONS THAT JUST CONCLUDED ON JULY 2ND?

[43] A. YES, THAT'S WHAT WE WERE TALKING ABOUT.

[43] Q. AND DURING THE DAY ON JULY 2ND, DID EMPLOYEES REQUEST TO COME BACK TO WORK?

[43] A. YES.

[43] Q. AND THESE ARE BARGAINING UNIT EMPLOYEES, EMPLOYEES REPRESENTED BY 287?

[43] A. YES.

[43] Q. AND DID YOU HAVE ANOTHER DISCUSSION WITH MR. NETTO IN THE AFTERNOON OF JULY 2ND?

[43] A. YES.

[43] Q. AND WHERE WERE YOU WHEN THIS DISCUSSION TOOK PLACE?

[43] A. I WAS SITTING AT MY DESK IN WATSONVILLE.

[43] Q. WAS THERE A TELEPHONE DISCUSSION?

[43] A. YES.

[43] Q. AND WAS ANYONE ELSE ON THE LINE TO YOUR KNOWLEDGE?

[43] A. NOT THAT I KNOW OF.

[43] Q. WHO CALLED WHOM?

[43] A. MR. NETTO CALLED ME.

[43] Q. AND WHAT WAS THE CONVERSATION?

[43] A. THE FIRST THING HE ASKED ME WAS HAD I SEEN THE BACK-TO-WORK AGREEMENT AND I SAID, NO, GEORGE, I HAVEN'T GOTTEN ANYTHING FROM YOU.

AND HE SAID, THOSE DARN OPERATING ENGINEERS, THEY WERE SUPPOSED TO GIVE YOU SOMETHING. AND I SAID, WELL, NO ONE HAS GIVEN ME ANYTHING, GEORGE.

AND HE SAID, WELL, I'LL GET IT OVER TO YOU AS SOON AS I CAN AND HE SAID THAT THE AGREEMENT HAS BEEN REACHED AND THE CONTRACT IS BEHIND THIS AND NOW WE WORK ON MOVE ON TO THE BACK-TO-WORK AGREEMENT AS WE DISCUSSED. AND THAT'S SOMETHING THAT WE CAN DO NEXT WEEK ON WEDNESDAY OR THURSDAY OF THE FOLLOWING WEEK.

[44] Q. AND DURING THIS DISCUSSION, DID HE DESCRIBE THE RATIFICATION?

[44] A. NO.

[44] Q. DID HE DISCUSS THE RATIFICATION?

[44] A. NO.

[44] Q. DID HE GIVE YOU A TIME FOR THE BACK-TO-WORK AGREEMENT TO BE LOOKED AT?

[44] A. HE SAID NEXT WEEK. WE HAD PREVIOUSLY TALKED ABOUT GILROY. IT'S IMPORTANT TO REMEMBER THAT THIS IS ALL HAPPENING IN ONE DAY. THAT MORNING AT 4:00 O'CLOCK IN THE MORNING WE WERE TALKING ABOUT COPYING THE GILROY PROCESS WHICH WAS TO DO IT AFTER RATIFICATION, AFTER PEOPLE WERE BACK TO WORK AND, AND THAT, THAT HAD TAKEN SEVEN OR EIGHT DAYS. AND SO WHAT MR. NETTO SAYS WAS THAT WE COULD WORK ON THIS NEXT WEEK AND THAT WEDNESDAY OR THURSDAY WOULD BE FINE WITH HIM.

[45] Q. DID YOU HAVE A NEGOTIATION THAT MORNING ON JULY 2ND WITH ANY OTHER UNIONS?

[45] A. YES.

[45] Q. AND WAS MR. NETTO SUPPOSED TO BE THERE?

[45] A. YES, THAT MEETING WAS STARTING AT 10:00 O'CLOCK IN THE MORNING AND WE ASKED THAT IT BE POSTPONED TO 11:00 SO SHIRLEY AND I COULD CHANGE CLOTHES AND BE THERE BY 11:00.

[45] Q. AND DID MR. NETTO SHOW UP AT THOSE NEGOTIATIONS IN THE MORNING THAT HE WAS SCHEDULED TO BE AT?

[45] A. NO, HE DID NOT.

[45] Q. WERE THESE IMPORTANT—WAS IT IMPORTANT FOR MR. NETTO TO BE AT THESE NEGOTIATIONS?

[45] A. YES.

[45] Q. AND WHY IS THAT?

[45] A. BECAUSE THERE ARE FOUR UNIONS IN THIS OTHER CONTRACT THAT WE'RE NEGOTIATING AND LOCAL 287 REPRESENTS THE TEAMSTERS, AND MR. NETTO IS THE ONLY REPRESENTATIVE LOCAL 287 IN THOSE NEGOTIATIONS.

[45] Q. AND HOW DID YOU, DID YOU LEARN THAT, THAT YOUR CONTRACT WITH 287 HAD BEEN RATIFIED?

[46] A. WELL, THE FIRST THING I LEARNED WAS FROM THE DRIVERS THEMSELVES. MR. SHUCOLIS, THE MANAGER, CALLED ME ON THE PHONE AS I WAS COMING BACK FROM ALAMEDA OR THAT'S WHERE THE OTHER NEGOTIATIONS HAD TAKE BEING PLACE STARTING FROM 11:00 AND RUNNING UNTIL 12:00 OR 12:30 AND SAYS MR. SHUCOLIS CALLED ME AND SAID THE DRIVERS ARE CALLING ASKING FOR START TIMES. AND WE WERE CLOSED THE 4TH OF JULY, THE SATURDAY, BUT NORMALLY WE'RE OPENED ON SATURDAY.

[46] MR. BEESON: YOUR HONOR, MOVE TO STRIKE THAT AS HEARSAY.

[46] THE COURT: WHO IS MR. SHUCOLIS?

[46] THE WITNESS: HE'S THE SAN JOSE CONCRETE MANAGER, THE MANAGER OF THE BRANCH.

[46] THE COURT: BUT WHO DOES HE WORK FOR?

[46] THE WITNESS: WELL—

[46] THE COURT: IS HE AN EMPLOYEE OF GRANITE ROCK OR THE UNION.

[46] THE WITNESS: GRANITE ROCK.

[46] THE COURT: THE OBJECTION IS SUSTAINED.

BY MR. LEVINS:

[46] Q. OKAY. YOU WERE TALKING ABOUT STATEMENTS THAT MR. SHUCOLIS MADE. DID YOU FIND OUT ABOUT THE RATIFICATION FROM ANYONE ELSE?

[47] A. WELL, WHEN WE ARRIVED AT THE MEETING IN ALAMEDA, THE BUSINESS MANAGER FOR THE LABORER'S UNION, A JIM HOLMER, CAME UP TO SHIRLEY AND ME AS WE WERE JUST COMING IN THE DOOR PRACTICALLY AND UP THE STAIRS AND THE STAIRS—

[47] MR. BEESON: OBJECTION. I'M SORRY TO INTERRUPT, BUT I OBJECT TO THE ANSWER AND THE QUESTION.

[47] THE COURT: IS MR. HOLMER SOMEONE IDENTIFIED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS?

[47] THE WITNESS: HE'S WITH THE LABORER'S UNION, ONE OF THE OTHER—THERE ARE FOUR UNIONS INVOLVED IN THIS AND HE'S ONE OF THE OTHER UNIONS.

[47] THE COURT: THE OBJECTION IS SUSTAINED.

BY MR. LEVINS:

[47] Q. WOULD YOU DESCRIBE HOW YOU LEARNED ABOUT THE RATIFICATION FROM MR. NETTO?

[47] A. MR. NETTO CALLED ME AT 4:45 AND SAID THAT THE AGREEMENT HAD BEEN APPROVED AND THAT THE CONTRACT WAS BEHIND US NOW AND THAT OUR ATTENTION COULD MOVE NEXT WEEK TO THE BACK-TO-WORK AGREEMENT AND HE WAS SATISFIED WITH GETTING THAT WORK DONE ON THURSDAY OR FRIDAY OF THAT WEEK.

[48] Q. DID YOU TELL ANYBODY ABOUT THIS CONVERSATION WITH MR. NETTO IMMEDIATELY AFTER IT HAPPENED?

[48] A. YES, I DID.

[48] Q. AND WHO DID YOU TELL IT TO?

[48] A. MS. OW.

[48] Q. AND WHAT WAS YOUR CONVERSATION WITH MS. OW?

[48] A. I CONTACTED MS. OW BY TELEPHONE. SHE HAD LEFT THE OFFICE BY THAT TIME AND RELAYED THE CONVERSATION TO HER.

[48] Q. AT THAT TIME WERE THERE PICKETS UP AT GRANITE ROCK?

[48] THE COURT: AT WHICH TIME?

[48] MR. LEVINS: ON JULY 2ND, IN THE EVENING.

[48] THE WITNESS: NONE THAT I KNOW OF.

BY MR. LEVINS:

[48] Q. WHEN WAS THE FIRST TIME THAT PICKETS CAME BACK?

[48] A. TUESDAY, JULY 6TH, LATE EVENING, 10:00 P.M., SOMETHING LIKE THAT.

[48] Q. AND WAS THIS BEFORE OR AFTER, AFTER A PHONE CALL THAT YOU HAD WITH MR. NETTO?

[48] A. AFTER.

[48] Q. AND WHAT WAS YOUR PHONE CALL WITH MR. NETTO PRIOR TO THE PICKETS COMING BACK?

[48] A. WELL, THE FIRST PHONE CALL I RECEIVED FROM MR. NETTO WAS AROUND 8:30—AT 2:30 JULY 6TH.

[49] THE COURT: A.M. OR P.M.?

[49] THE WITNESS: AROUND 8:30 A.M. AND MR. NETTO ASKED IF I RECEIVED THE FAXED BACK TO WORK AGREEMENT THAT MR. BEESON HAD DONE, THAT HE TOLD ME MR. BEESON HAD DONE. AND I SAID I HAVE NOT SEEN IT YET, BUT I CAN SEE IT ON MY E-MAIL AND ALL OF THE FAXES IN OUR COMPANY COME TO US AS E-MAILS. I SAID I COULD SEE IT HERE. I'LL READ IT AND GET BACK TO YOU.

BY MR. LEVINS:

[49] Q. DID YOU GET BACK TO HIM?

[49] A. LATER IN THE DAY.

[49] Q. AND WHEN WAS THE CONVERSATION WITH HIM, LATER THAT SAME DAY?

[49] A. WELL, HE CALLED ME AROUND 11:30 AND TOLD ME THAT ALL OF THE MEMBERS WERE THERE. IT SOUNDED TO ME LIKE PERHAPS I WAS ON SPEAKER PHONE BUT I'M NOT CERTAIN ABOUT THAT. HE SAID ALL OF THE MEMBERS ARE HERE AND THEY WANTED TO KNOW IF THE BACK-TO-WORK AGREEMENT HAS BEEN SIGNED BECAUSE—SO THAT THEY COULD GO BACK TO WORK, AND I SAID I'M REVIEWING IT AND I'M REVIEWING IT WITH SHIRLEY AND WE'LL GET

BACK TO THAT AND LATER THAT DAY WE SENT HIM A REVISED BACK-TO-WORK AGREEMENT.

[50] Q. ANYTHING ELSE THAT YOU SAID TO HIM DURING THAT CONVERSATION ABOUT, ABOUT EMPLOYEES COME BEING BACK TO WORK?

[50] A. WELL, WHEN HE CALLED AT 11:30 AND HE SAID THE PEOPLE ARE ALL HERE AND WANT TO GO BACK TO WORK AND I SAID, GEORGE, THEY SHOULD BE BACK TO WORK, WE HAVE AN AGREEMENT AND HE CONTINUED TO PRESS, WELL, SIGN THE BACK-TO-WORK AGREEMENT, SIGN THE BACK-TO-WORK AGREEMENT.

[50] MR. LEVINS: CAN I CONSULT WITH COUNSEL FOR ONE SECOND?

[50] THE COURT: CERTAINLY.

(PAUSE IN PROCEEDINGS.)

BY MR. LEVINS:

[50] Q. DID YOU HAVE ANY CONVERSATIONS WITH ANY 287 EMPLOYEES, YOUR EMPLOYEES ABOUT WHAT OCCURRED AT 9:00 A.M. ON JULY 2ND, 2004?

[50] A. YES, I DID.

[50] Q. AND WHO DID YOU HAVE CONVERSATIONS WITH?

[50] A. I HAD CONVERSATIONS WITH TWO OR THREE PEOPLE ON PICKET LINES AND THEN I ALSO TALKED WITH TWO OR THREE PEOPLE ON THE 7TH.

[50] Q. AND WHAT DID THEY SAY TO YOU ABOUT A RATIFICATION VOTE?

[50] MR. BEESON: THE QUESTION IS TOO BROAD, YOUR HONOR, AND IT SHOULD BE SPECIFICALLY IDENTIFIED WITH RESPECT TO WHOM HE IS SPEAKING.

THE COURT: SUSTAINED AS TO SPECIFICITY.

BY MR. LEVINS:

[51] Q. WITH WHOM DID YOU SPEAK ABOUT THIS?

[51] A. I SPOKE WITH BRIAN SHERIKIN ON THE PICKET LINE.

[51] Q. AND WHO IS BRIAN SHERIKIN?

[51] A. BRIAN SHERIKIN IS THE MIXER DRIVER. HE'S ALSO THE STEWARD FOR LOCAL 287 AT SAN JOSE CONCRETE.

[51] Q. WHAT DID MR. SHERIKIN SAY TO YOU, IF ANYTHING, WITH REGARD TO WHAT OCCURRED AT 9:00 A.M. ON JULY 2ND?

[51] A. HE SAID THE GUYS WERE ENTHUSIASTIC ABOUT THE DEAL, THEY LIKED THE DEAL A LOT. I ASKED THEM IF THEY VOTED AND HE SAID, YES, THEY HAD.

[51] MR. BEESON: I'M GOING TO MOVE TO STRIKE ON THE GROUNDS OF HEARSAY.

[51] MR. LEVINS: THAT'S CLEARLY NOT HEARSAY. IT'S CLEARLY A UNION EMPLOYEE.

[51] THE COURT: OBJECTION IS OVERRULED. ASSUMING THAT MR. SHERIKIN IS A SHOP STEWARD.

[51] BY MR. LEVINS:

[51] Q. DID YOU SPEAK WITH ANY OTHER 287 EMPLOYEES WITH REGARDS TO WHETHER OR NOT THERE WAS A VOTE THAT MORNING?

[52] A. YES, I ALSO SPOKE TO EDDIE ALVAREZ ON THE PICKET LINE.

[52] Q. AND WHAT HAD HE SAID?

[52] A. HE SAID THAT MR. NETTO HAD GONE THROUGH THE WHOLE PROPOSAL WITH HIM AT 9:00 O'CLOCK AND THAT AFTER THAT PEOPLE WERE EXCITED ABOUT IT AND THEY LIKED THE AGREEMENT VERY, VERY MUCH. AND I ASKED IF THEY VOTED AND HE SAID, YES, THEY VOTED.

[52] Q. DID YOU HAVE ANY DISCUSSION OF THE OTHER 287 MEMBERS ABOUT THE RATIFICATION VOTE?

[52] A. YES, I TALKED TO CHRIS NOVAK.

[52] Q. AND WHEN DID YOU SPEAK WITH MR. NOVAK?

[52] A. I DON'T HAVE THE EXACT DATE BUT PROBABLY AROUND THE 9TH OF JULY AROUND THAT FRIDAY.

[52] Q. AND HE WAS ONE OF THE NEGOTIATORS?

[52] A. YES, HE WAS.

[52] Q. AND WHAT WAS YOUR CONVERSATIONS WITH HIM ABOUT WHAT OCCURRED IN THE MORNING OF JULY 2ND?

[52] A. HE SAID, BRUCE, EVERYBODY WANTS TO GO BACK TO WORK. WE LIKE THE AGREEMENT VERY MUCH, AND I ASKED HIM IF THEY HAD VOTED AND HE SAID, YES. AND I SAID HOW DID YOU VOTE? AND HE SAID PIECES OF PAPER WERE HANDED OUT AND PEOPLE WROTE YES OR NO ON THEM AND THEY WERE COLLECTED.

HE SAID MR. NETTO DID NOT RELEASE THE RESULTS OF THE VOTE BUT THAT AFTER COLLECTING THEM INTO TWO PILES HE TOLD PEOPLE THINGS LOOK GOOD.

[53] Q. ANY OTHER CONVERSATIONS WITH 287 EMPLOYEES ABOUT THE VOTE ON JULY 2ND?

[53] A. YES, I SPOKE WITH JESS GALAZ.

[53] MR. BEESON: I DIDN'T HEAR THAT.

[53] THE WITNESS: JESS GALAZ, G-A-L-A-Z.

BY MR. LEVINS:

[53] Q. WHEN WAS THIS CONVERSATION WITH MR. GALAZ?

[53] A. AROUND THE SAME DATE, THE 9TH.

[53] Q. AND WHAT DID MR. GALAZ TELL YOU ABOUT THE VOTE?

[53] A. MR. GALAZ TOLD ME ABOUT HOW MUCH HE WAS SUFFERING PERSONALLY. ACTUALLY THAT TOOK ABOUT THE FIRST 15 MINUTES OF THE CALL OF HOW HE WAS SUFFERING PERSONALLY FROM THE STRIKE AND THEN HE REPORTED THE SAME THING THAT PEOPLE WERE ENTHUSIASTIC THAT THERE HAD BEEN A VOTE.

AND I ASKED IF THERE HAD BEEN A BALLOT VOTE AND HE SAID, YES.

[53] Q. A VOTE ON THE AGREEMENT ITSELF?

[53] A. YES.

[53] Q. WITH MR. NETTO PRESENT?

[53] A. YES.

[54] Q. OKAY. AND WHO ELSE DID YOU SPEAK WITH? WHAT OTHER 287 EMPLOYEES DID YOU SPEAK WITH ABOUT THIS?

[54] A. DON HOFF.

[54] Q. WHEN DID YOU SPEAK WITH DON HOFF?

[54] A. AROUND THE SAME DATE.

[54] Q. AND WHAT DID MR. HOFF SAY ABOUT WHETHER OR NOT THERE WAS A RATIFICATION VOTE IN THE MORNING OF JULY 2ND?

[54] A. HE WAS VERY, VERY UPSET ABOUT THE FACT THAT HE WASN'T BACK TO WORK AND FELT THAT HE SHOULD BE WORKING AND I SAID TO HIM, WELL, DID YOU TAKE A VOTE? AND HE SAID, YES. AND I SAID, WHAT WAS THE OUTCOME OF THE VOTE OR DO YOU KNOW THE OUTCOME OF THE VOTE? AND HE SAID ALL I KNOW IS GEORGE SAID THINGS LOOK GOOD AFTER HE COLLECTED THE BALLOTS.

[54] Q. DID YOU SPEAK WITH ANYBODY ELSE, ANY OTHER 287 EMPLOYEES ABOUT THE RATIFICATION VOTE?

[54] A. THAT'S WHAT I RECALL NOW.

[54] MR. LEVINS: I HAVE NOTHING FURTHER ON THE ISSUE.

[54] THE COURT: VERY WELL. YOU MAY CROSS-EXAMINE.

CROSS-EXAMINATION

BY MR. BEESON:

[55] Q. I WOULD LIKE TO DIRECT YOUR ATTENTION, MR. WOOLPERT TO THE EARLY MORNING HOUR ON JULY 2ND, AT THE POINT

THAT, THAT THE NEGOTIATIONS ON THE NEW CONTRACT HAD COME TO A CONCLUSION. WHO WAS IT, IF ANYBODY, THAT BROUGHT UP THE QUESTION OF A BACK-TO-WORK AGREEMENT AT THAT POINT?

[55] A. MR. NETTO.

[55] Q. AND WHAT DID HE SAY?

[55] A. HE SAID WE NEED TO GET A BACK-TO-WORK AGREEMENT DONE.

[55] Q. AND NOW -

[55] A. AT SOME POINT.

[55] Q. NOW, DID YOU PROVIDE HIM WITH A COPY OF A BACK-TO-WORK AGREEMENT SUBMITTED BY THE COMPANY?

[55] A. YES, WE DID A LITTLE LATER.

[55] MR. BEESON: MAY I APPROACH THE WITNESS, YOUR HONOR?

[55] THE COURT: SURE.

BY MR. BEESON:

[55] Q. I'M SHOWING YOU A DOCUMENT CALLED BACK-TO-WORK AGREEMENT AND IT HAS A CONTRACT AGREEMENT THAT IS ATTACHED TO THE NETTO DECLARATION AS EXHIBIT A. DO YOU RECOGNIZE THAT DOCUMENT?

[56] A. YES.

[56] Q. IS THAT THE DOCUMENT THAT YOU GAVE TO MR. NETTO ON JULY 2ND?

[56] A. YES.

[56] Q. WHAT CONVERSATION WAS THERE ABOUT THIS DOCUMENT AT THAT TIME BETWEEN YOU AND MR. NETTO?

[56] A. WE TALKED ABOUT THE GILROY PROCESS OF RATIFICATION FOLLOWED BY BACK-TO-WORK AGREEMENT THE FOLLOWING WEEK AND MR. NETTO MADE SOME COMMENTS TO MS. OW AND ME AND THAT HE KIND OF ENJOYED WORKING WITH US AND FOR GILROY AND THAT WE'LL GET THIS DONE.

AFTER WE HANDED THAT TO HIM, HIS OTHER RESPONSE WAS THAT HE WAS GOING TO SEND IT TO YOU, MR. BEESON, FOR REVIEW.

[56] Q. AND DID HE MAKE ANY COMMENT ABOUT THE CONTENT OF THE DOCUMENT?

[56] A. NOT THAT I RECALL.

[56] Q. DO YOU RECALL THAT HE POINTED OUT PARTICULARLY PARAGRAPH 4, AND I'LL SHOW YOU THE AGREEMENT. DID HE MAKE A COMMENT ABOUT WHETHER OR NOT PARAGRAPH 4 WOULD BE A PROBLEM?

[56] A. I THINK HE—I THINK WE HAD A VERY BRIEF CONVERSATION ABOUT IT THAT HE FELT THAT THAT WOULD BE A HIT TO MORALE FOR THE PURPOSE IF THEY WERE

THE NONUNION TRUCKS STILL IN THE YARD BUT THAT'S ALL I—I THINK IT WAS VERY BRIEF AND I BELIEVE THAT'S ALL HE SAID.

[57] Q. AND ISN'T IT A FACT THAT HE ALSO SAID IN THAT CONNECTION THAT IT WOULD NOT BE ACCEPTABLE, PARAGRAPH 4 WOULD NOT BE ACCEPTABLE, PARAGRAPH 4 THE WAY IT WAS WRITTEN?

[57] A. I DON'T REMEMBER HIM SAYING THAT. I REMEMBER HIM TALKING ABOUT THE MORALE OF THE PEOPLE.

[57] Q. IS IT NOT A FACT THAT HE ALSO SAID ON THAT OCCASION, AS HE WAS LOOKING AT THE DOCUMENT THAT YOU GAVE TO HIM, THAT THERE WOULD HAVE TO BE AN AGREEMENT UPON THE RETURN-TO-WORK AGREEMENT BEFORE, BEFORE THE COLLECTIVE BARGAINING AGREEMENT WAS SUBMITTED FOR RATIFICATION?

[57] A. ABSOLUTELY NOT.

[57] Q. YOU HAVE MENTIONED THE GILROY SITUATION. DID YOU PARTICIPATE IN THE SETTLEMENT OF THAT STRIKE?

[57] A. YES, I DID.

[57] Q. AND THAT WAS HOW LONG AGO?

[57] A. IT WAS AUGUST OF 2003.

[57] Q. AND ON THAT OCCASION WOULD YOU DESCRIBE HOW THE BACK-TO-WORK AGREEMENT WAS NEGOTIATED IN

CONNECTION WITH THE CONCLUSION OF THE CONTRACT AGREEMENT ON THE—ON ITS MERITS?

[58] A. WELL, THE CONTRACT, THE AGREEMENT WAS TAKEN TO PEOPLE FOR I VOTE ON AUGUST 1ST, WHICH WAS A FRIDAY. I RECALL IT VERY WELL. AND WE WAITED TO HEAR BACK FROM MR. NETTO ABOUT WHETHER IT HAD BEEN RATIFIED OR NOT. WE ACTUALLY DID NOT HEAR BACK FROM HIM THAT EVENING, BUT I HEARD FROM ANOTHER UNION THAT IT HAD BEEN RATIFIED BECAUSE THEY WERE WORRIED THAT HE WAS STILL GOING TO BE OUT ON STRIKE AND SO ON TUESDAY—ON SATURDAY MORNING AUGUST 2ND, THE NEXT DAY, WHICH IS OUR NEXT WORK DAY, PEOPLE DID RETURN TO WORK AND THEY ALSO WORKED ON THE FOLLOWING MONDAY, THE 4TH OF AUGUST.

THE DISCUSSION BETWEEN MR. NETTO AND I WENT BACK AND FORTH BY TELEPHONE DURING THAT WHOLE FOLLOWING WEEK AND THE AGREEMENT WAS SIGNED ON AUGUST THE 8TH BY MR. NETTO AND BY ME ON AUGUST THE 11TH.

[58] Q. WHEN YOU SAY THE AGREEMENT WAS SIGNED ON AUGUST 8TH, ARE YOU REFERRING TO THE NEW COLLECTIVE BARGAINING AGREEMENT?

[58] A. NO, NO, THE BACK—TO—WORK AGREEMENT.

[58] Q. THE BACK—TO—WORK AGREEMENT?

[58] A. THE CONTRACT WAS, WAS ACCEPTED, THE PEOPLE HAD GONE BACK TO WORK AND OUR DISCUSSIONS REGARDING THE BACK—TO—WORK AGREEMENT WAS NOT UNTIL PEOPLE HAD GONE BACK TO WORK AND THE CONTRACT HAD BEEN ACCEPTED.

[59] Q. WAS THERE ANY CONTROVERSIES THAT AROSE IN CONNECTION WITH THE BACK—TO—WORK AGREEMENT HAVING TO DO WITH DISCIPLINE?

[59] A. I DON'T RECALL ANYTHING SPECIAL IF THAT'S WHAT YOU'RE ASKING ME.

[59] Q. NOW, IT'S A FACT, IS IT NOT, THAT YOU DID NOT ATTEND THE RATIFICATION MEETING THAT YOU SAY WHERE THE CONTRACT WAS RATIFIED?

[59] A. AT GILROY?

[59] Q. YES. NO, NO. AT THE SAN JOSE FACILITY?

[59] A. I WASN'T AT THE MEETING, NO.

[59] Q. AND ALL YOU KNOW ABOUT WHAT HAPPENED AT THAT MEETING IS WHAT PEOPLE HAVE TOLD YOU; IS THAT CORRECT?

[59] A. YES, AND THE FACT THAT PEOPLE HAD CALLED AND THAT MR. NETTO HAD CALLED ME AND IT WAS RATIFIED.

[59] Q. DO YOU HAVE ANY KNOWLEDGE ABOUT WHAT TIME THE RATIFICATION MEETINGS SO—CALLED WAS HELD, WHAT TIME OF DAY?

[59] A. WELL, MR. NETTO AND THE COMPANY HAD DISCUSSIONS ABOUT HIM HOLDING THE MEETING BY 6:00 A.M. BUT AS WE GOT CLOSER AND CLOSER TO 6:00 A.M., WE WERE NOW ABOUT 4:00 A.M., MR. NETTO ASKED, COULD WE CHANGE THE 6:00 A.M. RATIFICATION DEADLINE TO 9:00 A.M. AND, AND WE AGREED AND OUR LAST BEST AND FINAL OFFER WE MADE THAT CHANGE AND RATIFICATION COULD BE DONE BY 9:00 A.M.

[60] Q. SO YOUR UNDERSTANDING OF THE MEETING WAS CONDUCTED AROUND 9:00 A.M. ON THAT SAME DAY? ,

[60] A. YES.

[60] Q. WHEN DID YOU FIRST HAVE ANY REPORTS GIVEN TO YOU ABOUT WHAT HAPPENED AT THE MEETING?

[60] A. WHEN MR. SHUCOLIS CALLED ME AND TOLD ME THE DRIVERS WERE CALLING IN AND ASKING FOR START TIMES TO GO BACK TO WORK THE NEXT DAY OR ON THE PHONE TUESDAY, WHICH WOULD BE THE NEXT WORK DAY AFTER THE HOLIDAY.

[60] Q. AND YOU MENTION IN YOUR TESTIMONY THAT, THAT YOU TALKED TO ONE OR TWO OF THE EMPLOYEES ON THE PICKET LINE; IS THAT RIGHT?

[60] A. YES.

[60] Q. AND WHERE WAS THAT? WHERE WAS THE PICKETING BEING CONDUCTED?

[60] A. AT SAN JOSE CONCRETE.

[60] Q. AND WHAT TIME OF DAY WAS THAT?

[60] A. EARLY MORNING.

[60] Q. AND CAN YOU GIVE US ANY IDEA OF TIME?

[60] A. PERHAPS 7:00 O'CLOCK.

[61] Q. 7:00 O'CLOCK?

[61] A. IN THE MORNING.

[61] Q. THAT WOULD HAVE BEEN BEFORE THE MEETING?

[61] A. NO, NO, NO. MY CONVERSATIONS WITH EMPLOYEES WERE LATER THAT WEEK.

[61] Q. LATER?

[61] A. LATER THAT WEEK. I SAID AROUND THE 9TH.

[61] Q. WELL, LET'S GET THE RECORD STRAIGHT HERE. MY UNDERSTANDING FROM YOUR ANSWER IS THAT YOU TALKED WITH SOMEBODY ON THE PICKET LINE WHO TOLD YOU ABOUT THE MEETING AND THE

CONVERSATION OCCURRED AROUND 7:00 A.M. DO I HAVE THAT WRONG?

[61] A. YES, LATER THAT WEEK. LATER THE FOLLOWING WEEK.

[61] Q. OH, THE FOLLOWING WEEK?

[61] A. LATER THE FOLLOWING WEEK.

[61] Q. DID YOU HAVE ANY CONVERSATION WITH ANYONE ON JULY 2ND ABOUT THE RATIFICATION MEETING?

[61] A. ONLY WITH MR. NETTO.

[61] Q. HOW MANY TELEPHONE CALLS DID YOU HAVE WITH MR. NETTO ON THAT DAY AFTER YOU HAD BROKEN OFF NEGOTIATIONS?

[61] A. ONE.

[61] Q. AND THAT WAS THE ONE THAT YOU REFER TO AROUND 4:45, I BELIEVE:

[62] A. YES.

[62] Q. AND WERE YOU AT HOME OR IN YOUR OFFICE WHEN THAT CALL CAME IN?

[62] A. I WAS AT THE OFFICE.

[62] Q. NOW, ONCE AGAIN, WHEN WAS IT THAT YOU TALKED ABOUT WITH MEMBERS OF THE UNION WHILE THEY WERE, PICKETING ABOUT GETTING BACK TO WORK?

[62] A. I DON'T RECALL THE EXACT DATE BUT IT WOULD HAVE BEEN LATER THAT FOLLOWING WEEK, PERHAPS THE 8TH OR 9TH.

[62] Q. SO IT WOULD HAVE BEEN AFTER PICKETING RESUMED ON TUESDAY THE 6TH OF JULY?

[62] A. YES, AFTER PICKETING RESUMED.

[62] Q. OKAY. DID YOU ASK THEM WHY THEY WERE PICKETING IF THEY HAD RATIFIED THE AGREEMENT?

[62] A. WELL, I DIDN'T EXACTLY ASK THAT QUESTION BUT, BUT WHAT I LEARNED WAS THAT—

[62] MR. BEESON: WELL, NO, I WON'T ANSWER THE QUESTION FOR YOU.

[62] THE WITNESS: I DIDN'T ASK THAT QUESTION.

BY MR. BEESON:

[62] Q. WERE YOU SURPRISED THAT THEY WERE PICKETING?

[62] A. WELL, MR. NETTO HAD SAID TO ME ON THE 6TH OF JULY AT THAT 11:30 PHONE CALL THAT IF WE DIDN'T GET THE BACK-TO-WORK AGREEMENT DONE, THAT HE WAS GOING TO REESTABLISH THE PICKET LINES. SO I WAS AWARE OF THAT THREAT.

[63] Q. I'M A LITTLE BIT CONFUSED ABOUT THE TIME STILL.

DID YOU SAY THAT THE CONVERSATION THAT YOU HAD WITH TWO PEOPLE ON THE PICKET LINE OCCURRED ABOUT 7:00 O'CLOCK IN THE MORNING? WE'LL GET TO THE DAY LATER.

[63] A. YEAH, IT WAS EARLY IN THE MORNING.

[63] Q. OKAY. SO THAT WOULD HAVE BEEN ON JULY 6TH?

[63] A. NO, IT WAS LATER IN THE WEEK, LIKE THURSDAY OR FRIDAY OF THAT WEEK.

[63] Q. WELL, PICKETING HAD BEEN RESUMED ON JULY 6TH, HAD IT NOT?

[63] A. NO, IT DID NOT RESUME UNTIL THE EVENING OF JULY 6TH.

[63] Q. ALL RIGHT.

[63] A. AROUND 10:00 O'CLOCK AND ONLY AT OUR SAN JOSE QUARRY.

[63] Q. AND DID ANYONE WORK ON JULY 6TH?

[63] A. YES, EVERYONE WORKED.

[63] Q. AND YOU'RE TALKING ABOUT THE 4TH OF JULY HOLIDAY?

[63] A. YES, PEOPLE HAD WORKED JULY THE 2ND AND PEOPLE WORKED TUESDAY THE 6TH ALSO.

[64] Q. OKAY. AND THEN—

[64] A. NOT INCLUDING SAN JOSE CONCRETE.

[64] Q. AND SO THE, IF I UNDERSTAND IT CORRECTLY NOW, MR. WOOLPERT, YOU DIDN'T TALK WITH ANYONE ON THE PICKET LINE ON JULY 2ND ABOUT 7:00 O'CLOCK ON THE JULY 6TH ABOUT 7:00 O'CLOCK IN THE MORNING?

[64] MR. LEVINS: YOUR HONOR, ASKED AND ANSWERED A NUMBER OF TIMES.

[64] THE WITNESS: NO, I DON'T THINK I SAID.

[64] THE COURT: OVERRULED.

[64] MR. BEESON: OKAY.

[64] Q. WERE YOU TALKING WITH ANY OF THE DRIVERS ON JULY THE 6TH AT ANY TIME DURING THE DAY?

[64] A. I DON'T THINK SO, NO.

[64] Q. OKAY. NOW, WHEN YOU TALKED WITH MR. NETTO AT 4:45 IN THE AFTERNOON OF JULY 2ND AS YOU TESTIFIED, DID HE TELL YOU WHEN THE MEETING HAD OCCURRED?

[64] A. NO.

[64] Q. DID HE TELL YOU THAT THERE HAD BEEN A SECRET BALLOT VOTE?

[64] A. NO.

[64] Q. DID HE TELL YOU WHERE THE MEETING HAD TAKEN PLACE?

[64] A. NO.

[64] Q. WHAT DID HE SAY ABOUT THE MEETING AT WHICH YOU SAY THE RATIFICATION OCCURRED?

[65] A. WELL, HE SAID THAT THE AGREEMENT HAD BEEN ACCEPTED, THAT THE CONTRACT WAS BEHIND US AND THAT NOW WE COULD TURN OUR FOCUS TO THE BACK-TO-WORK AGREEMENT WHICH WE COULD DO THE FOLLOWING WEEK AND THAT WEDNESDAY OR THURSDAY WOULD BE FINE TO COMPLETE THAT EFFORT.

[65] Q. AT ABOUT 4:00 O'CLOCK IN THE MORNING ON JULY 2ND AFTER NEGOTIATIONS ON THE CONTRACT HAD BEEN CONCLUDED, WHAT WAS SAID ABOUT MR. NETTO GETTING BACK TO YOU TO TELL YOU ABOUT WHETHER THERE WAS RATIFICATION?

[65] A. WHAT I RECALL ON THAT WAS THAT HE WAS GOING TO HAVE THE RATIFICATION MEETING AT 9:00 AND THEN AS HE WENT OUT, AS HE WENT OUT THE DOOR WE SAID WE'LL SEE YOU IN ALAMEDA FOR THIS OTHER NEGOTIATION MEETING.

[65] Q. DID YOU ASK HIM TO GET BACK TO YOU ABOUT THE MEETING WITH THE RANK AND FILE?

[65] A. NO, WE THOUGHT WE WOULD SEE HIM IN ALAMEDA.

[65] Q. DID YOU MAKE ANY EFFORT TO GET IN TOUCH WITH HIM TO ASK WHAT HAD HAPPENED AT THE RATIFICATION MEETING PRIOR TO THE 4:45 TELEPHONE CALL?

[65] A. NO.

[65] Q. SO IF I UNDERSTAND IT CORRECTLY, THERE WAS COMPLETE LACK OF COMMUNICATION BETWEEN YOU FROM THE TIME YOU AND MR. NETTO, FROM THE TIME THE NEGOTIATIONS CAME TO A CONCLUSION AT 4:00 O'CLOCK IN THE MORNING UNTIL THAT 4:45 TELEPHONE CALL?

[66] A. I DIDN'T SPEAK WITH MR. NETTO IN THAT, IN THAT TIMEFRAME, YES.

[66] Q. THAT'S WHAT I'M ASKING.

]66] A. SORRY.

[66] Q. ALL RIGHT. THAT'S ALL I HAVE.

[66] THE COURT: VERY WELL. ANY FURTHER QUESTIONS?

[66] MR. LEVINS: JUST A COUPLE.

REDIRECT EXAMINATION

BY MR. LEVINS:

[66] Q. MR. WOOLPERT, YOU REFERRED TO NEGOTIATIONS IN ALAMEDA. I THINK WE TALKED ABOUT THAT ON DIRECT EXAMINATION. THOSE ARE THE NEGOTIATIONS THAT MR. NETTO HAD PLANNED TO ATTEND; IS THAT RIGHT?

[66] A. THAT'S CORRECT.

[66] Q. AND HOW LONG DID THOSE NEGOTIATIONS LAST?

[66] A. WELL, THEY WERE TO BEGIN AT 10:00 IN THE MORNING. WE ASKED THAT THEY BE POSTPONED TO 11:00 SO I COULD CHANGE CLOTHES AND STUFF AND IT STARTED AT 11:00 AND, AND THERE WERE SEVERAL COMMENTS ABOUT WHERE'S GEORGE, ET CETERA. EVENTUALLY THE MEETING CONCLUDED AROUND 12:15 OR SO WHEN THE CHAIR OF THE MEETING SAID WITHOUT CHANGE WE CAN'T GO FORWARD.

[67] Q. AND THAT WAS AFTER BASICALLY THE ALL NIGHT SESSION OF THE NIGHT BEFORE, THAT WAS THE FOLLOWING DAY; CORRECT?

[67] A. YES, THE SAME MORNING.

[67] Q. DO YOU REMEMBER WHAT YOU DID THAT AFTERNOON PRIOR TO THE CALL WITH MR. NETTO?

[67] A. YES. I DROVE HOME AND RECEIVED SOME TELEPHONE CALLS FROM THE PLANT MANAGER AND WENT TO MY HOUSE AND IN CUPERTINO WITH THE IDEA THAT I WOULD GET SOME SLEEP OR REST. AND WHEN I GOT THERE I COULDN'T REST, I WAS JUST—AND SO I DECIDED TO DRIVE DOWN TO WATSONVILLE. SO I GOT TO WATSONVILLE LATE IN THE AFTERNOON.

[67] Q. IN THE PAST, HOW HAS MR. NETTO INFORMED YOU THAT THE AGREEMENT HAD BEEN RATIFIED?

[67] A. I WOULD SAY THERE'S NO SPECIFIC WAY THAT HE DOES THAT AND SOMETIMES I WOULD SAY MOST OF THE TIME HE JUST DOESN'T. I DON'T REMEMBER HIM, FOR EXAMPLE, EVER TELLING US THE OUTCOME OF A VOTE, THAT THE VOTE WAS 9 TO 7 OR 8 TO 10 OR WHATEVER IT WAS. HE'S, HE'S NOT REALLY GOOD WITH SORT OF FOLLOWING PROCEDURES AND FOLLOWING UP ON THINGS.

[67] Q. AND SO WHEN YOU DO FIND OUT FROM HIM, IS IT, IS IT VERBAL?

[68] A. USUALLY WE FIND OUT BY PEOPLE GOING BACK TO WORK OR FROM ANOTHER UNION LIKE WE DID IN THE GILROY CASE.

[68] Q. OKAY. NOTHING FURTHER. THANK YOU.

[68] THE COURT: VERY WELL. YOU MAY STEP DOWN.

[68] MR. BEESON: NOTHING. FURTHER.

[68] THE COURT: DO YOU HAVE FURTHER EVIDENCE I TAKE IT ON THE PLAINTIFF'S SIDE?

[68] MR. MATHIASON: YOUR HONOR, WE WOULD LIKE TO PUT ON VERY BRIEFLY MS. OW. SHE WAS THE SECOND PERSON.

[68] THE COURT: WELL—

[68] MR. MATHIASON: OR WE COULD HOLD HER FOR A REBUTTAL WITNESS.

[68] THE COURT: YES, THE IMPORTANT PART OF THIS ISSUE THAT I'M TRYING TO DECIDE IS BETWEEN MR. NETTO AND MR. WOOLPERT. SO I'LL INVITE YOU TO CALL MR. NETTO TO THE STAND.

[68] MR. BEESON: I'M PREPARED TO CALL MR. NETTO.

[68] THE CLERK: RAISE YOUR RIGHT HAND, PLEASE.

GEORGE NETTO,

BEING CALLED AS A WITNESS ON BEHALF OF THE DEFENDANT, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

[69] THE WITNESS: I DO.

[69] THE CLERK: STATE YOUR FILE NAME FOR THE RECORD, PLEASE, AND SPELL YOUR LAST NAME.

[69] THE WITNESS: MY NAME IS GEORGE ALBERT NETTO. AND WHAT WAS THE OTHER PART OF THE QUESTION?

[69] THE CLERK: SPELL YOUR LAST NAME. THE WITNESS: N-E-T-T-O.

[69] THE COURT: YOU MAY PROCEED.

DIRECT EXAMINATION

BY MR. BEESON:

[69] Q. COULD YOU EXPLAIN YOUR POSITION?

[69] A. I'M A BUSINESS REPRESENTATIVE FOR TEAMSTERS LOCAL 287 AND HAVE BEEN DOING SUCH FOR THE LAST 14 YEARS HANDLING NEGOTIATIONS AND REPRESENTING CONTRACTS FOR SANTA CLARA AND SAN BENITO COUNTY FOR THE TEAMSTERS ORGANIZATION.

[69] Q. AND IT'S BEEN TESTIFIED HERE THAT YOU WERE REPRESENTING LOCAL 287 IN THE NEGOTIATIONS WITH GRANITE ROCK; IS THAT CORRECT?

[69] A. THAT'S CORRECT.

[69] Q. AND LET'S GO DIRECTLY TO THE ALL NIGHT NEGOTIATING SESSION THAT OCCURRED ON JULY 1 AND 2. IN ADDITION TO

YOURSELF, WAS THERE ANYBODY ELSE THERE FOR THE UNION?

[70] A. YES, SIR, WE SELECTED A NEGOTIATING COMMITTEE THROUGH THE RANK AND FILE WAS CHRIS NOVAK AND BRIAN DRISCOLL SELECTED BY THEIR PEERS TO BE INVOLVED IN THE NEGOTIATIONS AND WE WERE PRESENT EVERY MEETING THAT I ATTENDED.

[70] Q. AND, IN FACT, WAS AN AGREEMENT, TENTATIVE AGREEMENT AT LEAST REACHED THAT MORNING WITH RESPECT TO THE TERMS AND CONDITIONS OF THE ACCOUNT?

[70] A. THAT IS CORRECT.

[70] Q. NOW, ONCE THAT AGREEMENT HAD BEEN REACHED, TELL US WHAT HAPPENED NEXT BETWEEN YOU AND MR. WOOLPERT?

[70] A. WELL, THAT HAPPENED, AS MY DECLARATION STATES THERE, WE STARTED AT ABOUT 9:15 AND IF I CAN BACK IT UP FROM THE BEGINNING OF THE MORNING WHAT HAD TRANSPIRED? WE HAD A FEDERAL MEDIATOR INVOLVED IN THE NEGOTIATIONS FOR THE QUARRY CONTRACT AND THE UNIONS PLURAL WANTED TO GET THIS OUTSTANDING ISSUE RESOLVED FOR THE SAN JOSE CONTRACT AND TAKE GOOD USE OF THE FEDERAL MEDIATOR THAT WAS PRESENT.

WE TENTATIVELY AGREED WITH MR. WOOLPERT'S FORMAT IN UTILIZING THE MEDIATOR TO TRY TO RESOLVE ALL STRIKING ISSUES AND ALL CONTRACTS AT THAT MEETING.

THAT WENT WITH, WITH NO SUCCESS, NO OUTCOME AND, AND WE LEFT THAT MEETING AT APPROXIMATELY 1:30 IN THE AFTERNOON.

THE MESSAGE THAT THE FEDERAL MEDIATOR PROVIDED TO MYSELF ALONG WITH THE RANK AND FILE COMMITTEE THAT MR. WOOLPERT WASN'T INTERESTED IN GETTING THE SITUATION RESOLVED AND THAT WE COULD STRIKE UNTIL THE COWS COME HOME.

SO WE LEFT THE MEETING. AT APPROXIMATELY 4:30 THAT AFTERNOON I RECEIVED A PHONE CALL FROM MR. WOOLPERT AND I SPECIFICALLY REMEMBER THE TIME BECAUSE I WAS TAKING MY SON TO HIS 13 YEAR OLD ALL STAR GAME HE WANTED TO MEET. HE REQUESTED THAT WE RESUME NEGOTIATIONS AND I TOLD HIM THAT I DIDN'T KNOW WHAT TIME I COULD MEET WITH HIM, THAT I WOULD HAVE TO CONTACT THE TWO RANK AND FILE PEOPLE THAT ASSISTED ME AND I WOULD GET BACK TO HIM.

I CALLED HIM AT APPROXIMATELY 6:20, 6:30 IN THE EVENING. I TOLD HIM I COULD MEET SOME TIME AFTER 9:00 O'CLOCK AND HE SAID THAT WOULD BE FINE, LET'S MEET AT THE BERRYESSA PLANT THERE IN SAN JOSE TO

TALK ABOUT OUR DIFFERENCES AND SEE IF WE CAN GET THIS CONTRACT RESOLVED.

WE NEGOTIATED FROM 9:15 UNTIL APPROXIMATELY 4:00 O'CLOCK IN THE MORNING EXCHANGING PROPOSALS BACK AND FORTH.

AT WHAT TIME HE SAID THAT, THAT THIS IS WHAT WE HAVE TO OFFER AND WE HAD, WE HAD RESOLVED THE ECONOMIC ISSUES AND OTHER AREAS OF CONCERNS FROM THE PROPOSALS THAT WERE SUBMITTED BY THE RANK AND FILE.

I TOLD MR. WOOLPERT AT 4:00 O'CLOCK IN THE MORNING PRIOR TO ME RATIFYING THIS TENTATIVE AGREEMENT THAT IT IS NECESSARY FOR US TO MUTUALLY AGREE TO A RETURN-TO-WORK AGREEMENT FOR THE SIMPLE REASON THAT WE HAVE INVOLVED MORE THAN JUST TEAMSTERS LOCAL 287 AND AFFECTED OTHER EMPLOYEES AND THIS HAS GONE ON A LONG TIME, THAT THIS IS A STANDARD ORDER OF BUSINESS THAT WE NEED TO GET RESOLVED.

[72] Q. DID HE PROVIDE YOU WITH A PROPOSAL ALONG THOSE LINES?

[72] A. AS A MATTER OF FACT HE DID. I ASKED SHIRLEY OW AT APPROXIMATELY 4:00 O'CLOCK IN THE MORNING HE SAID HE HAS SOMETHING.

I SAID, LISTEN, I'M NOT AN ATTORNEY. THIS IS A LEGAL DOCUMENT. I'M GOING TO HAVE

TO REVIEW THIS WITH OUR COUNSEL. HE ASKED SHIRLEY OW TO GO OUT TO HER CAR AND BRING BACK THE PROPOSAL THAT IS IN MY DECLARATION THAT HE WAS FULLY AWARE THAT I WANTED TO HAVE A RETURN-TO-WORK AGREEMENT PRIOR TO GETTING ANYTHING RATIFIED.

[73] MR. MATHIASON: OBJECTION, YOUR HONOR, THAT'S SPECULATION.

[73]THE COURT: SUSTAINED.

BY MR. BEESON:

[73] Q. IS THE BACK-TO-WORK AGREEMENT THAT YOU WERE LOOKING AT EXHIBIT A TO THE DECLARATION THAT YOU HAVE HERE?

[73] A. THAT'S CORRECT.

[73] Q. ALL RIGHT. NOW, DID YOU MAKE ANY COMMENTS ABOUT, ABOUT WHAT WAS IN EXHIBIT A?

[73] A. YES, SPECIFICALLY ITEM NUMBER 4 WHERE HE WANTED TO ALLOW, ALLOW NONUNION TRUCKS, THE ONES THAT HAD BEEN CONTINUING CROSSING THE PICKET LINE FOREVER SINCE JUNE 8TH, TO ALLOW THESE PEOPLE TO CONTINUE TO WORK IN NO SPECIFIC ORDER AHEAD OF HIS EMPLOYEES. IN FACT, WE HAD QUITE A BIT OF DISCUSSION ON THAT ITEM AND SAID, WELL, WHAT ABOUT YOUR OWN EMPLOYEES THAT WANT TO RETURN TO WORK, HOW ARE THEY GOING TO

RETURN TO WORK? HOW IS THIS GOING TO AFFECT THEM? AND HE SAID THEY HAD A LEASE OR CONTRACTUAL OBLIGATION WITH THESE NONUNION PEOPLE.

I TOLD HIM AND MS. OW THAT THAT WOULD CREATE A HOSTILE WORK ENVIRONMENT AND THAT FOR THE MOST PART OF THAT THAT WOULD BE UNACCEPTABLE TO TEAMSTERS LOCAL 287.

[74] Q. WERE THERE ANY COMMENTS MADE BY YOU WITH RESPECT TO ANY OF THE OTHER PROVISIONS IN THE DOCUMENT?

[74] A. IF I COULD SEE THE DOCUMENT IN FRONT OF ME. I COULD RECOLLECT AND TRY TO GIVE YOU WHAT I CAN RECALL FROM THAT.

[74] Q. THE RECORD MAY REFLECT THAT I'M PLACING EXHIBIT A TO THE DECLARATION IN FRONT OF THE WITNESS.

[74] A. WELL, AS A MATTER OF FACT, ITEM NUMBER 2 I HAD. I WANTED TO GET CLARIFICATION FROM THE EMPLOYER OF WHO THEY WERE INTENDING TO POTENTIALLY GOING TO DISCIPLINE FROM THE PERIOD OF JUNE 9TH AND JULY 2ND.

AT THAT POINT MR. WOOLPERT PULLED OUT OF HIS BRIEFCASE OR OUT OF A BOX A PICTURE OF A TURNED OVER BACKHOE THAT HAPPENED ON THE HEDDING AND COLEMAN JOB SITE FOR SOME OTHER PAY VEHICLES CONSTRUCTION COMPANY AND WAS

ALLEGING THAT WAS ONE INCIDENT THAT HE WAS TROUBLED BY AND HE WAS INVESTIGATING THAT ALONG WITH SOME STRIKE MISCONDUCT ALLEGEDLY AT THE REDWOOD CITY FACILITY.

SO I DID OBJECT TO NUMBER 2 WITHOUT SPECIFICALLY KNOWING WHO WAS INVOLVED, WHAT WAS THE DATE, AND GAVE ME AN OPPORTUNITY TO LOOK INTO THE SITUATION.

[75] Q. ANY OTHER COMMENTS THAT YOU MADE?

[75] A. ITEM NUMBER 4 I OUTRIGHTLY REJECTED AND TOLD MR. WOOLPERT AND SHIRLEY OW THAT OUR COUNSEL DID NOT NORMALLY ARRIVE AT HIS OFFICE UNTIL 9:00 A.M., THAT I WOULD FAX OVER THIS PROPOSAL TO OUR COUNSEL AND I WOULD, I WOULD BE FAXING OVER AN ACCEPTABLE RETURN-TO-WORK AGREEMENT PROVIDED ON BEHALF OF THE TEAMSTERS UNION.

[75] Q. WHAT WAS SAID BETWEEN YOU AND MR. WOOLPERT AT THAT TIME WITH RESPECT TO HOLDING A MEETING TO INFORM THE MEMBERSHIP AS TO WHAT HAD HAPPENED?

[75] A. WELL, THERE'S A VERY IMPORTANT INGREDIENT THAT HAS BEEN LEFT OUT HERE IS THAT WHEN WE REACHED THIS TENTATIVE AGREEMENT.

[75] MR. MATHIASON: OBJECTION, YOUR HONOR, THIS IS BACKGROUND.

[75] THE COURT: OBJECTION IS OVERRULED.

[75] THE WITNESS: THE IMPORTANT INGREDIENT HERE WAS THAT I FELT THAT THE TENTATIVE AGREEMENT WAS, WAS SOMETHING THAT THE EMPLOYEES WERE REQUESTING IN THESE LONG AND ONGOING NEGOTIATIONS, HOWEVER, MR. WOOLPERT HAD PLANNED THIS POPS AND ROCKS CONCERT ON THE 4TH OF JULY THAT HE SELLS TICKETS. IT'S A HUGE COMMUNITY EVENT PUT ON AT THE QUARRY.

[76] Q. DID HE TELL YOU THAT?

[76] A. YES, HE DID. HE MADE REFERENCE TO THE BOY SCOUTS WOULD NOT BE ABLE TO SELL THEIR LEMONADE AND MAKE $600 AND THAT WOULD BE VERY TERRIBLE TO THE COMMUNITY AND IT WOULD GIVE THE UNIONS A BAD EYE AND WENT ON FURTHER TO SAY THAT THAT'S WHY THE UNIONS CAN'T GO OUT AND NEGOTIATE OR GET PEOPLE TO BECOME UNION IS BECAUSE OF OUR VISIBLE IMAGE OUT IN THE COMMUNITY.

[76] Q. DID HE ASK YOU TO DO ANYTHING ABOUT THE PICKETING THAT WERE THEN PICKETING?

[76] A. YES, AS I WAS BUILDING UP TO IT HERE AND I'M SORRY I'M LONG WINDED BUT I WANT TO MAKE SURE ALL OF THE FACTS

COME OUT AS THEY WERE. I TOLD HIM THAT SINCE WE HAD A TENTATIVE AGREEMENT THAT IT WOULD BE NECESSARY TO SIGN A RETURN—TO—WORK AGREEMENT THAT WAS MUTUALLY ACCEPTABLE AND I WOULD SUBMIT IT FOR RATIFICATION BUT ON A GOOD FAITH EFFORT ON JULY 2ND, AT 4:00 O'CLOCK OR 4:15 IN THE MORNING MR. WOOLPERT SAID IT WAS IMPERATIVE TO GET THE PICKETS AWAY FROM THE QUARRY AND IDENTIFY THAT, THAT THESE DIFFERENT FACILITIES HE WOULD LIKE ME TO, TO GET THE PICKETS REMOVED.

SO WE HAD AN ONGOING DISCUSSION SINCE IT WAS AT 4:00 O'CLOCK, 4:15 IN THE MORNING THAT THE PICKETS ACTUALLY DIDN'T COME DOWN TO THE AROMAS QUARRY UNTIL 7:30 IN THE MORNING, BUT I HAD THE RESPONSIBILITY OF THE TWO OTHER INDIVIDUALS OF CONTACTING ALL OF THESE PEOPLE THAT WERE PICKETING TO NOT PICKET, THAT WE WERE GOING TO HAVE A MEETING TO REVIEW THE COMPANY'S PROPOSAL AND ON GOOD FAITH I PULLED DOWN THE PICKETS AND TOLD MR. WOOLPERT AT THAT MEETING, PRIOR TO LEAVING AT 4:15 IN THE MORNING, THAT I WOULD DO—REMOVE THE PICKETS FOR THE POPS AND ROCKS CONCERT; THAT WE WERE MAKING PROGRESS AND A GOOD FAITH EFFORT. I WANTED TO PUT MY GOOD FAITH EFFORT FORWARD.

[77] Q. WHAT DID YOU SAY, IF ANYTHING, ABOUT HOLDING A MEETING THAT SAME MORNING WITH YOUR MEMBERSHIP?

[77] A. I DIDN'T SAY ANYTHING ABOUT A MEETING. MY PRIMARY CONCERN WAS THAT I WOULD FULFILL MY COMMITMENT OF REMOVING THE PICKETS ON JULY 2ND, HOWEVER, WE WOULD CONTINUE TO BE ON STRIKE UNTIL THE CONTRACT WAS RATIFIED.

[78] Q. DID YOU SAY ANYTHING ABOUT, TO MR. WOOLPERT AT THAT TIME ABOUT HOW THE BACK-TO-WORK AGREEMENT WOULD BE COORDINATED WITH THE RATIFICATION OF THE CONTRACT?

[78] A. YES, I DID. I SAID TO HIM AND SHIRLEY OW ON SEVERAL OCCASIONS AT THAT MEETING PRIOR TO 4:15, AND OUR DEPARTURE THAT IT WAS PART AND PARCEL THAT PART OF THIS BACK-TO-WORK AGREEMENT DID, IN FACT, THE TERMS AND CONDITIONS OF THE EMPLOYEE'S EMPLOYMENT AND IT WOULD BE IMPERATIVE THAT WE HAVE THIS ACCOMPLISHED PRIOR TO RATIFICATION VOTE.

[78] Q. NOW, AFTER YOU TOOK WHAT ACTIONS YOU HAD TO DO TO GET THE PICKETS REMOVED, WHAT DID YOU DO NEXT IN THIS CONNECTION?

[78] A. AT APPROXIMATELY I WANT TO SAY IT WAS A LITTLE BIT AFTER 9:00 O'CLOCK IN THE MORNING, THE EMPLOYEES THAT WORK AT THE SAN JOSE CONCRETE FACILITY,

THE BERRYESSA PLANT HAD COME DOWN TO REVIEW THE COLLECTIVE BARGAINING AGREEMENT THAT WE DISCUSSED UP UNTIL 4:00 O'CLOCK IN THE MORNING.

[78] Q. HAD YOU TOLD THEM ABOUT IT THAT—HOW DID THEY GET NOTIFIED OF THIS?

[78] A. WHEN THE, WHEN THE RANK AND FILE CHRIS NOVAK AND BRIAN DRISCOLL CONTACTED THE EMPLOYEES THAT WERE SCHEDULED TO PICKET BEGINNING AT 6:00 O'CLOCK IN THE MORNING, TO COME DOWN TO THE UNION HALL, THAT WE WANTED TO DISCUSS THE TENTATIVE AGREEMENT WITH THE EMPLOYEES ABOUT WHAT WE HAD DISCUSSED ALL NIGHT ABOUT.

[79] Q. AND WHEN DID YOU HAVE THAT MEETING WITH THE STRIKERS?

[79] A. THAT MEETING TOOK PLACE BETWEEN 9:00 AND 9:30 IN THE MORNING ON JULY 2ND.

[79] Q. NOW, TELL US EXACTLY WHAT YOU, WHAT YOU TOLD THE STRIKERS AT THAT MEETING?

[79] A. OKAY. THE FIRST THING WHEN I CALLED THE MEETING TO ORDER, A MAJORITY OF THE EMPLOYEES WERE PRESENT FROM THE SAN JOSE FACILITIES THAT WERE ON STRIKE BECAUSE THIS COLLECTIVE BARGAINING AGREEMENT.

I TOLD THEM THAT I HAD AN OFFER TO SHARE WITH THEM AND REVIEW THAT THE COMPANY HAS PUT FORWARD.

I TOLD THEM THAT WE ARE GOING TO REVIEW THIS PROPOSED TENTATIVE AGREEMENT, HOWEVER, THERE WILL BE NO VOTE TAKING PLACE UNTIL SUCH TIME THAT WE, WE MUTUALLY CAN AGREE TO A RETURN-TO-WORK AGREEMENT.

AND I EXPLAINED WHY, WHY WE HAD TO HAVE THE RETURN-TO-WORK AGREEMENT AND EVERYBODY UNDERSTOOD THAT AND, AND WE, WE WENT AND REVIEWED THE ENTIRE PROPOSED TENTATIVE AGREEMENT WITH THE EMPLOYEES AND AT THE END OF THE MEETING THE EMPLOYEES TURNED IN ALL OF THE PAPERWORK THAT I HAD PASSED OUT, THE PHOTOCOPIES OF THE TENTATIVE AGREEMENT AND UNDERSTOOD THAT, THAT WE WERE GOING TO NEED A RETURN-TO-WORK AGREEMENT BEFORE THEY COULD VOTE.

[80] Q. MR. NETTO, WAS THERE ANY KIND OF A VOTE OR EXPRESSION OF OPINION ON ANY ASPECT OF THIS, OF THIS BY THE MEMBERSHIP AT THAT TIME?

[80] A. THERE WAS ONE PROVISION WHICH THE COMPANY WANTED TO, IF YOU WANT TO CALL IT HIDE OR PUT IT INTO A LETTER OF UNDERSTANDING, A CONCEPT ABOUT SATURDAY WORK.

CURRENTLY THE TEAMSTERS ENJOY TIME AND A HALF OR A PREMIUM FOR SATURDAY WORK AND THE COMPANY WANTED TO PUT SOME VERBIAGE INTO A LETTER OF UNDERSTANDING AS PART OF THE CONTRACT FOR SATURDAY WORK FOR SOME WORK SHARING ON, ON SATURDAY TO WHERE POTENTIALLY NOT EVERY EMPLOYEE COULD GET PAID TIME AND A HALF.

[80] Q. WAS THERE A PROBLEM WITH THAT AS FAR AS YOU WERE CONCERNED?

[80] A. MY POSITION ALWAYS HAS BEEN IN NEGOTIATIONS THAT WE'RE TRYING TO ACHIEVE AREA STANDARDS AND THE CONTRACT THAT WAS NEGOTIATED IN THE REDWOOD CITY FACILITY IN 2001, WE WANTED PARITY WHICH PROVIDES TIME AND A HALF FOR SATURDAY WORK.

[81] Q. SO THAT PROPOSAL MADE BY MR. WOOLPERT WAS NOT UP TO PARITY?

[81] A. NO, IT WAS NOT.

[81] Q. AND DID YOU ASK THE, ASK THE EMPLOYEES TO, TO EXPRESS THEIR POSITION AS TO THAT PARTICULAR PROPOSAL?

[81] A. WHAT I DID IS AFTER I EXPLAINED AND REVIEWED THE CONSIDERED I SAID THERE'S A LETTER OF UNDERSTANDING AND IN THE EVENT THAT WE CAN REACH AN ACCEPTABLE RETURN-TO-WORK AGREEMENT, DOES ANYBODY HAVE ANY CONCERNS WITH THIS LETTER OF UNDERSTANDING WHICH IS

PROPOSED AND THE EMPLOYEES SHARED AT THAT TIME THAT THEY HAD NO CONCERN AND THAT THAT LETTER OF UNDERSTANDING WOULD BE ACCEPTABLE PERTAINING TO THE SATURDAY WORK.

[81] Q. AND WAS THERE A SECRET BALLOT VOTE TAKEN AT THAT MEETING TO RATIFY THE TENTATIVE AGREEMENT ON THE NEW COLLECTIVE BARGAINING AGREEMENT?

[81] A. NO, SIR.

[81] Q. HAVE YOU EVER, SINCE THAT TIME, HELD A RATIFICATION VOTE FOR THAT PURPOSE?

[82] A. NO, SIR.

[82] Q. NOW, WHAT DID YOU DO ABOUT GETTING TOGETHER A COUNTER PROPOSAL ON THE RETURN-TO-WORK AGREEMENT?

[82] A. AT APPROXIMATELY 9:00 O'CLOCK WHEN THE EMPLOYEES WERE, WERE COMING INTO THE UNION HALL, I BELIEVE I FIRST CONTACTED YOUR OFFICE BY PHONE, EXPLAINED THAT WE HAD A TENTATIVE AGREEMENT AND IT WOULD BE NECESSARY TO HAVE A RETURN-TO-WORK AGREEMENT AND BECAUSE WE HAD OTHER UNIONS AFFECTED EMPLOYEES RESPECTING OUR PICKET LINES AND IF YOU COULD DRAFT A DOCUMENT FOR ME, THAT I WOULD FAX THE PROPOSAL UP TO YOU THAT WAS PROVIDED TO ME BY MR. WOOLPERT.

[82] Q. DID YOU FAX IT TO ME?

[82] A. YES, I DID.

[82] Q. AND DID YOU GET A, A RETURN FAX FROM ME GIVING YOU LANGUAGE FOR A COUNTER PROPOSAL?

[82] A. YES, I DID.

[82] Q. AND WILL YOU LOOK AT EXHIBIT B TO YOUR DECLARATION. IS THAT WHAT I DRAFTED AND SENT TO YOU?

[82] A. YES, IT IS.

[82] Q. AND DO YOU REMEMBER ABOUT WHAT TIME OF DAY YOU RECEIVED THAT?

[82] A. I WANT TO SAY IT WAS PROBABLY ABOUT 9:30, 9:45 A.M., SOME TIME IN THE MORNING.

[83] Q. CAN'T RESIST THE TEMPTATION TO SAY THAT THAT'S A VERY FAST TURN AROUND LEGAL SERVICE. HOWEVER, WHAT DID YOU DO WITH IT?

[83] A. WHAT I DID WITH YOUR PROPOSED DRAFT BACK-TO-WORK AGREEMENT I THOUGHT IT WOULD BE BEST THAT IT DIDN'T SAY BEESON, TAYER & BODINE AT THE TOP AND YOUR FAX NUMBER. SO I ASKED OUR SECRETARY, MAUREEN, TO TYPE UP THE DRAFT PROPOSAL AND I, AND I WENT OVER TO THE FAX MACHINE AND KNOWING THAT WE HAD SCHEDULED NEGOTIATIONS FOR GRANITE ROCK WITH

THE AROMAS QUARRY AT THE OPERATING ENGINEER'S OFFICE IN ALAMEDA. I FAXED THE PROPOSAL ATTENTION FRED HERSHBACK AND SAID, "FRED, COULD YOU PLEASE PROVIDE A COPY OF THIS BACK-TO-WORK AGREEMENT TO BRUCE WOOLPERT, AND PLEASE HAVE HIM GIVE ME A CALL ON MY CELL PHONE AND GAVE MY CELL PHONE NUMBER ON THE FAX COVER SHEET."

[83] Q. DID YOU GET A CALL LATER THAT AFTERNOON FROM MR. WOOLPERT?

[83] A. NO, SIR.

[83] Q. DID YOU CALL HIM AT ANY OTHER TIME?

[83] A. YOU KNOW, I MAY HAVE CALLED HIM IN THE AFTERNOON TO FIND OUT WHAT THE STATUS OF THE BACK-TO-WORK AGREEMENT BECAUSE I HAD NOT HEARD FROM ··· HIM, NOR HAD I HEARD OF ANY FAX PRIOR TO GOING TO MY SON'S BASEBALL GAME.

[84] Q. WHERE WERE YOU BETWEEN 4:00 AND 5:00 O'CLOCK IN THE AFTERNOON?

[84] A. I WAS AT LOU VIERRA FIELD IN SANTA CLARA.

[84] Q. IS THAT WHERE THE BASEBALL GAME WAS?

[84] A. YES, SIR.

[84] Q. AND DO YOU HAVE A CELL PHONE?

[84] A. YES, I DO.

[84] Q. AND I'LL ASK YOU AGAIN, DO YOU RECALL CALLING MR. WOOLPERT?

[84] A. I MAY HAVE CALLED HIM AND IF I DID CALL HIM, I THINK I WAS CALLING TO FIND OUT HAD HE RECEIVED AND REVIEWED THE BACK-TO-WORK AGREEMENT AND WHAT WAS THE STATUS OF THE BACK-TO-WORK AGREEMENT SINCE I HAD NOT HEARD FROM HIM ALL DAY.

[84] Q. NOW, YOU HEARD MR. WOOLPERT'S TESTIMONY NOT TOO LONG AGO IN THIS COURTROOM THAT YOU TOLD HIM IN THAT TELEPHONE CALL THAT TOOK PLACE THAT THE COLLECTIVE BARGAINING AGREEMENT REACHED AFTER NEGOTIATIONS FOR A NEW CONTRACT HAD BEEN RATIFIED?

[84] A. THAT'S NOT CORRECT.

[84] Q. DID YOU SAY ANYTHING TO THAT EFFECT?

[84] A. ABSOLUTELY NOT.

[84] Q. HAD YOU EVER TOLD MR. WOOLPERT ON ANY OCCASION THAT THERE HAD BEEN A RATIFICATION VOTE TAKEN WITH RESPECT TO THE AGREEMENT FOR A NEW CONTRACT?

[85] A. I HAVEN'T TOLD MR. WOOLPERT OR ANYBODY FROM GRANITE ROCK THAT

THEIR SAN JOSE ACCOUNT HAD BEEN RATIFIED AT NO TIME.

[85] Q. AND, IN FACT, IT HASN'T?

[85] A. AND IT HAS NOT.

[85] Q. AND IS THERE A PRESENT AGREEMENT ON THE RETURN-TO-WORK AGREEMENT?

[85] A. NO, THERE'S NOT.

[85] MR. BEESON: THAT'S ALL I HAVE ON DIRECT, YOUR HONOR.

[85] THE COURT: VERY WELL. YOU MAY CROSS-EXAMINE.

CROSS-EXAMINATION

BY MR. MATHIASON:

[85] Q. NOW, I THINK YOU TESTIFIED THAT YOU HAD BEEN A BUSINESS AGENT FOR 14 YEARS?

[85] A. THAT'S CORRECT, SINCE JUNE OF 1989.

[85] Q. AND DO YOU KNOW HOW MANY TIMES YOU HAVE DONE COLLECTIVE BARGAINING AGREEMENTS WITH GRANITE ROCK?

[85] A. WELL, IT'S USUALLY ABOUT EVERY THREE YEARS FOR THE MOST PART WE HAVE SEVERAL CONTRACTS.

[85] Q. AND SO THAT'S AS MANY AS 15 OR 20 AGREEMENTS?

[85] A. I WOULD SAY THAT'S PRETTY CLOSE, THAT'S CORRECT.

[86] Q. AND DO YOU RECALL ON ANY OCCASION GIVING MR. WOOLPERT A REPORT ON THE RATIFICATION VOTE?

[86] A. HAVE I GIVEN HIM PERSONAL?

[86] Q. YES.

[86] A. NOT TO MY KNOWLEDGE PERSONALLY, NO.

[86] Q. OR TO ANYONE REPRESENTING GRANITE ROCK?

[86] A. YES, I HAVE I DONE IT TO SHIRLEY OW AND MIKE KENNEDY. HE'S THE BRANCH MANAGER AT THE GILROY FACILITY.

[86] Q. WHEN YOU GAVE THESE REPORTS, DID YOU INDICATE WHAT THE VOTE WAS?

[86] A. WE NEVER TELL THE EMPLOYER WHAT THE VOTE IS. IT'S EITHER REJECTED OR APPROVED.

[86] Q. SO YOUR RECOLLECTION IS THAT YOU VERBALLY TOLD, TOLD MS. OW OR MR. KENNEDY THAT THE RATIFICATION HAD OCCURRED, THE CONTRACT WAS APPROVED?

[86] A. ABSOLUTELY.

[86] Q. I'D LIKE YOU TO DIRECT YOUR ATTENTION, PLEASE, BACK TO THE GILROY FACILITY AND NEGOTIATIONS ON A CONTRACT THERE THAT, THAT TOOK PLACE IN, IN JULY OF 2003. DO YOU RECALL THAT?

[86] A. I CERTAINLY DO.

[86] Q. AND, AND WAS THERE A STRIKE TAKING PLACE AT THAT FACILITY?

[87] A. YES, THERE WAS.

[87] Q. AND DO YOU RECALL NEGOTIATING ON AUGUST 1ST, 2003?

[87] A. AUGUST 1ST, WITH SHIRLEY OW OUT AT THE AROMAS QUARRY SHE CAME OUT THERE, THAT'S CORRECT.

[87] Q. AND DID YOU REACH AN AGREEMENT ON THAT DATE?

[87] A. WE REACHED A TENTATIVE AGREEMENT ON AUGUST 1ST.

[87] Q. AND DO YOU RECALL WHEN IT WAS RATIFIED?

[87] A. IT WAS RATIFIED PER THE EMPLOYER'S REQUEST AT 6:00 P.M. AT THE GILROY FACILITY ON CHESNUT STREET.

[87] Q. AND WAS THAT ON AUGUST 1ST?

[87] A. IT WAS ON THAT FRIDAY. IF I HAD A CALENDAR I COULD TELL YOU FOR SURE.

[87] Q. AND ACCORDINGLY THE EMPLOYEES CAME BACK TO WORK ON SATURDAY AND THEN THE FOLLOWING MONDAY?

[87] A. MIKE KENNEDY WAS MADE AWARE AND HE SCHEDULED EMPLOYEES TO WORK ON SATURDAY AFTER HE HAD LEARNED, AND I SPECIFICALLY TOLD HIM THAT THE CONTRACT WAS RATIFIED, THAT'S CORRECT.

[87] Q. AND DO YOU RECALL THEN SUBSEQUENTLY THAT WEEK WORKING WITH MS. OW OR MR. WOOLPERT WITH REGARD TO A BACK-TO-WORK AGREEMENT?

[87] A. YES, I DO.

[88] Q. AND DO YOU RECALL APPROXIMATELY WHEN THE BACK-TO-WORK AGREEMENT WAS REACHED?

[88] A. THE BACK-TO-WORK AGREEMENT WAS NOT SIGNED AS MR. WOOLPERT SAID UNTIL I BELIEVE HE FINALLY SIGNED IT ON JULY 8TH, JULY 11TH, SOME TIME LATER IN THE WEEK. IT WASN'T FULLY EXECUTED, BUT THERE WAS NEGOTIATIONS ONGOING AFTER THE CONTRACT WAS RATIFIED.

[88] Q. AND, AND SPECIFICALLY, I THINK YOU SAID JULY, BUT DID YOU MEAN AUGUST?

[88] A. AUGUST 8TH. I STAND CORRECTED.

[88] Q. AND HAD YOU, HAD YOU APPROVED THAT AGREEMENT ON OR ABOUT THE 7TH OF AUGUST?

[88] A. IT HAS MY SIGNATURE, THAT'S CORRECT. WHATEVER THE DATE THE SIGNED COPY IS THAT'S WHEN I AGREED TO IT, THAT'S CORRECT.

[88] Q. AND THEN YOU FAXED IT BACK TO MR. WOOLPERT OR MS. OW?

[88] A. I BELIEVE MS. OW TOOK THE POSITION THAT'S A HANDS OFF ITEM ON OR ABOUT AUGUST 1ST, AND SAID YOU WOULD HAVE TO DEAL WITH MR. WOOLPERT DIRECTLY SO I BELIEVE I FAXED IT TO MR. WOOLPERT OR AT LEAST TO GRANITE ROCK'S CORPORATE OFFICE.

[88] Q. AND THAT WOULD HAVE BEEN ON OR ABOUT THE 7TH OF AUGUST?

[89] A. THERE WERE SEVERAL VERSIONS THAT WENT BACK AND FORTH BETWEEN AUGUST 1ST AND AUGUST 7TH. SO IF IT'S AUGUST 7TH, THAT'S CORRECT.

[89] Q. AND I'D LIKE TO MARK FOR IDENTIFICATION AS, AS—I DON'T KNOW IF WE HAVE AN ORDER ALREADY BUT IT WOULD BE NEXT IN ORDER OR EXHIBIT NUMBER 1, WHICHEVER ONE WORKS.

[89] THE COURT: LET'S CALL IT C. WE HAVE A AND B.

[89] MR. MATHIASON: AND IF I COULD APPROACH THE WITNESS.

[89] THE COURT: GIVE MR. BEESON ONE.

BY MR. MATHIASON:

[89] Q. IF YOU WOULD LOOK AT THE DOCUMENT MARKED FOR IDENTIFICATION AS EXHIBIT C. IT'S IDENTIFIED AS A BACK-TO-WORK AGREEMENT AUGUST 1ST, 2003. IS THAT YOUR SIGNATURE?

[89] A. YEAH, THAT'S MY SIGNATURE THERE ON THE LEFT-HAND SIDE WITH NO DATE.

[89] Q. AND IF YOU LOOK AT THE TOP OF THE DOCUMENT THERE THERE'S A FAX REFERENCE THAT SAYS AUGUST 7TH?

[89] A. THAT'S CORRECT.

[89] Q. AND IS THAT YOUR FAX REFERENCE TO THE BEST OF YOUR KNOWLEDGE?

[89] A. YES, THAT'S CORRECT.

[90] Q. AND, AND THEN YOU SEE MR. WOOLPERT'S SIGNATURE DATED THE 11TH OF AUGUST?

[90] A. THAT'S CORRECT.

[90] MR. MATHIASON: I WOULD MOVE THIS IN AS AN EXHIBIT.

[90] THE COURT: C IS IN EVIDENCE.

(WHEREUPON, PLAINTIFF'S EXHIBIT NUMBER C, HAVING BEEN PREVIOUSLY MARKED FOR IDENTIFICATION, WAS ADMITTED INTO EVIDENCE.)

BY MR. MATHIASON:

[90] Q. MR. NETTO, WAS IT SOME TIME THEREAFTER, SEVERAL MONTHS THEREAFTER, BEFORE THE COLLECTIVE BARGAINING AGREEMENT ACTUALLY GOT SIGNED FOR THAT PARTICULAR BARGAINING AGREEMENT?

[90] A. USUALLY THE PROCEDURE IS THAT WHEN YOU TENTATIVELY AGREE TO A CONTRACT, THE EMPLOYEES VOTE ON THE PROPOSED CHANGES, THEN THE CONTRACT AND THE CHANGES ARE PUT INTO THE BODY OF THE EXISTING CONTRACT AND YOU PROOF READ ALL OF THE CHANGES. SO I WOULD ANTICIPATE THAT, YES, THE CONTRACT WAS NOT SIGNED PROBABLY UNTIL JANUARY OR SOME TIME THEREAFTER.

[90] Q. AND DIRECTING YOUR ATTENTION BACK TO THE RATIFICATION MEETING OF THAT PARTICULAR AGREEMENT, WAS THAT DONE BY SECRET BALLOT?

[91] A. YES, IT WAS.

[91] Q. AND DO YOU HAVE A PRACTICE OF DOING SECRET BALLOT NORMALLY BY

TEARING UP A PIECE OF PAPER INTO SECTIONS?

[91] A. WELL, WHETHER IT'S TEARING UP A PIECE OF PAPER OR WHETHER IT IS IDENTIFIED, ARE YOU IN FAVOR OF THE EMPLOYER'S PROPOSAL AS LONG AS THE EMPLOYEES VOTE, I DON'T PARTICIPATE IN THE VOTE, AND THE EMPLOYEE COUNTS THE BALLOTS, I HAVE NOTHING TO DO WITH THE PROCESS OF THEM UNDERSTANDING WHAT THE OUTCOME IS FROM THE EMPLOYEE THAT OBSERVED AND TOOK THE VOTES AND PUT THE VOTES IN THE BALLOT BOX OR BY A SECRET BALLOT VOTE.

[91] Q. AND DO YOU RECALL WITH REGARD WITH THAT PARTICULAR VOTE, YOU DID TEAR UP THE PIECE OF PAPER AND PASS OUT THE PIECES OR HAVE SOMEONE PASS OUT THE PIECES?

[91] A. I BELIEVE WHAT HAPPENED IN THE GILROY FACILITY IS THAT THE EMPLOYEES EACH TOOK A PIECE OF PAPER AND WROTE YES OR NO. IF THEY WERE IN FAVOR OF THE EMPLOYEE'S PROPOSAL, THEY WERE COLLECTED BY ONE OF THE EMPLOYEES AND THEY WERE COUNTED AND THE RESULTS WERE READ AFTER THEY WERE COUNTED. I HAD NOTHING TO DO WITH THE PROCESS.

[92] Q. I'D LIKE TO DIRECT YOUR ATTENTION NOW BACK TO THE CURRENT NEGOTIATIONS OR WITH REGARD TO THE

CURRENT COLLECTIVE BARGAINING AGREEMENT.

YOU TESTIFIED THAT THE SESSIONS STARTED THURSDAY AT 9:15 IN THE EVENING; IS THAT CORRECT? A 9:15, 9:20, THAT'S CORRECT.

[92] Q. DO YOU RECALL A DISCUSSION EITHER WITH OW OR MR. WOOPLERT WHERE IT WAS AGREED THAT IF WE COULD GET AN AGREEMENT SO THAT PEOPLE COULD COME BACK TO WORK ON FRIDAY, THEY WOULD RECEIVE HOLIDAY PAY FOR MONDAY?

[92] A. NO, THAT CONVERSATION DIDN'T TAKE PLACE.

[92] Q. ARE YOU AWARE THAT, IN FACT, IF PEOPLE WORKED · ON FRIDAY, THEY RECEIVED HOLIDAY PAY FOR THAT MONDAY?

[92] A. IF THEY HAD A CONTRACT AND THE CONTRACT PROVISION CALLED FOR HOLIDAY PAY, IF YOU WORKED BEFORE A DAY OF A HOLIDAY, OF COURSE I WOULD EXPECT THAT.

[92] Q. SO, MR. NETTO, THIS THURSDAY NIGHT MARATHON BEFORE FRIDAY TO YOUR KNOWLEDGE HAD NOTHING TO DO WITH THE FACT THAT THERE WAS AN EFFORT TO GET PEOPLE BACK IN TIME TO GET THE HOLIDAY PAY?

[92] A. WE WEREN'T CONCERNED ABOUT THE HOLIDAY. WE WERE CONCERNED ABOUT

GETTING THE LABOR DISPUTE RESOLVED, PERIOD.

[92] Q. DIRECTING YOUR ATTENTION TO THE DISCUSSIONS THAT TOOK PLACE DURING THAT, THAT BARGAINING SESSION, DO YOU RECALL HOW FAR INTO THE BARGAINING SESSION IT WAS BEFORE THERE WAS ANY DISCUSSION ABOUT THE BACK-TO-WORK AGREEMENT?

[92] A. I, I WOULD THINK THE BACK-TO-WORK AGREEMENT CAME IN TO EFFECT PRIOR TO THEM HANDING US AND WHEN SHIRLEY HAD TO GO TO HOOK UP TO ANOTHER PRINTER TO GET THE PROPOSAL, THE TENTATIVE AGREEMENT TYPED UP, AND UNDERSTANDABLE BECAUSE THERE WERE THINGS CHANGED ON THE PIECE OF PAPER BACK AND FORTH AT THAT TIME I TOLD THEM BECAUSE THEIR FIRST PROPOSAL AT 3:00 O'CLOCK IN THE MORNING WANTED US TO VOTE THE EMPLOYEES AT 6:00 A.M. AND THE MOST IMPORTANT PART OF THE MISSING LINK HERE WAS THAT WE HAD A 4TH OF JULY POPS AND ROCKS CONCERT COMING UP AND IT WAS IMPERATIVE THAT WE REMOVE THE PICKETS. AND IT WASN'T SO IMPERATIVE TO GET THE 18 EMPLOYEES BACK TO WORK AT THE SAN JOSE FACILITY. IT WAS TO GET RID OF THE DISRUPTION, WORK ON THE RETURN-TO-WORK AGREEMENT, UNDERSTANDING THAT WE WERE STILL ON STRIKE AND UNTIL WE COULD MUTUALLY AGREE TO A RETURN-TO-WORK AGREEMENT.

[92] Q. SO IT'S APPROXIMATELY 3:00 O'CLOCK IN THE MORNING IS THE FIRST TIME THAT YOU RECALL THE BACK-TO-WORK AGREEMENT BEING DISCUSSED?

[94] A. I BELIEVE THAT TO BE CORRECT.

[94] Q. IS THAT ABOUT THE SAME TIME THAT THE TIME WAS CHANGED FOR RATIFICATION FROM 6:00 A.M. TO 9:00 A.M.?

[94] A. NO, THE 6:00 A.M. TO 9:00 A.M. DIDN'T CHANGE UNTIL, UNTIL CLOSER TO, CLOSER TO QUARTER TO 4:00 OR AT THE LAST MINUTE BECAUSE I TOLD THEM THAT WE NEEDED TO GET THE PEOPLE WHO WERE SCHEDULED TO PICKET STARTING AT 5:00 O'CLOCK IN THE MORNING AFTER THE PICKET LINES BECAUSE I WANTED TO HONOR MY RESPONSIBILITY AND WHAT I COMMITTED TO DO.

[94] Q. IS IT A NORMAL PRACTICE IN NEGOTIATIONS WITH GRANITE ROCK FOR THEM TO SPECIFY A TIME FOR THE RATIFICATION THAT IT HAS TO BE RATIFIED AS OF A CERTAIN TIME?

[94] A. I DON'T KNOW THAT I WOULD CALL THAT NORMAL. I CAN'T SPECULATE.

[94] Q. AND DID YOU HAVE A SIMILAR PROCESS WHEN YOU NEGOTIATED THE GILROY CONTRACT?

[94] A. IN THE GILROY AGREEMENT THEY REQUIRED ME OR ASKED ME IF I WOULD

HAVE THE CONTRACT RATIFIED BY 6:00 P.M. ON THAT FRIDAY EVENING.

[94] Q. THE, THE POPS AND ROCKS FESTIVAL IS ON THE 4TH OF JULY; CORRECT? WAS THAT A SUNDAY?

[95] A. I BELIEVE IT WAS ON SUNDAY, THAT'S CORRECT.

[95] Q. AND DO YOU KNOW WHO PARTICIPATES IN THAT PARTICULAR PROGRAM?

[95] A. THE STAGE HANDS. IT'S AN ANNUAL EVENT FOR GRANITE ROCK.

[95] Q. AND ARE YOU AWARE OF DISCUSSIONS THAT TOOK PLACE WITH THE LABOR COUNSEL REGARDING THAT PARTICULAR FESTIVAL AND NOT HAVE THE PICKETING TAKING PLACE AT THAT FESTIVAL?

[95] A. I'M AWARE THAT THE STAGE HANDS FILED FOR STRIKE SANCTIONS AND WERE, IN FACT, OUT THERE LEAFLETTING BEFORE THE POPS AND ROCKS CONCERT; THAT THEY WENT THROUGH THE SAME PROCESS WE WENT THROUGH TO GET STRIKE SANCTION.

[95] Q. AND ARE YOU AWARE THAT THAT SANCTION WAS THEN WITHDRAWN?

[95] A. NO, I'M NOT.

[95] Q. SO YOUR UNDERSTANDING IS THAT THE ONLY REASON THAT YOU WERE MEETING LATE INTO THE NIGHT ON THURSDAY AND INTO FRIDAY MORNING WAS TO ATTEMPT TO HAVE SOMETHING IN PLACE BECAUSE OF THIS UPCOMING EVENT ON THE 4TH OF JULY?

[95] A. NO, THAT'S NOT WHAT I'M SAYING. PLEASE DON'T MISQUOTE ME. WE SPEND MANY MEETINGS WITH GRANITE ROCK UP UNTIL 1:00 OR 2:00 O'CLOCK IN THE MORNING TO TRY TO OBTAIN A COLLECTIVE BARGAINING AGREEMENT THAT THESE EMPLOYEES HAD BEEN ON STRIKE SINCE JUNE 9TH AND THEY WERE TIRED STANDING OUT THERE IN FRONT OF THE FACILITIES AND WAITING TO GET THIS CONTRACT ISSUE RESOLVED; THAT THE HOLIDAY WAS NOT FROM OUR PERSPECTIVE THE KEY ISSUE OF WHY WE WANTED TO GET THE CONTRACTORS OFF.

[96] Q. WHEN, WHEN, WHEN DID, DID 287 RESUME ITS PICKETING OF GRANITE ROCK?

[96] A. WE HAD A MEETING ON TUESDAY WITH THE EMPLOYEES AT APPROXIMATELY 10:00 O'CLOCK IN THE MORNING.

I TOLD THE EMPLOYEES THAT I HAD RECEIVED A PHONE CALL FROM BRUCE WOOLPERT AT, AT I DON'T KNOW, 7:00 O'CLOCK, 6:45 A.M., SOME TIME IN THE MORNING, ONE, HE COULDN'T UNDERSTAND WHY THE EMPLOYEES WEREN'T BACK TO WORK.

I IMMEDIATELY CALLED BRUCE WOOLPERT AND SAID, BRUCE, HAVE YOU GOT THE RETURN-TO-WORK AGREEMENT THAT I FAXED OVER THE OPERATING ENGINEERS, AND IN ADDITION, I FAXED YOU PERSONALLY AFTER MY PHONE CONVERSATION WITH YOU ON JANUARY 3RD, WHEN YOU TOLD ME THAT YOU WERE GOING TO BE AT YOUR CORPORATE OFFICE, IT WAS FAXED AT 8:55 A.M.? AND HE SAID SAYS, OH, I HAVE AN E-MAIL FAX BUT MY FAX MACHINE DOESN'T WORK BETWEEN—IT ONLY WORKS BETWEEN 7:00 A.M. AND 7:00 P.M., MONDAY THROUGH FRIDAY.

THE EMPLOYEE SAID THE CONTRACT ISN'T RATIFIED. IF WE DO NOT HAVE THE RETURN-TO-WORK AGREEMENT ISSUE RESOLVED, WE WILL COMMENCE AND , CONTINUE PICKETING TONIGHT STARTING AT 10:00 P.M. AND THEY WENT TO THE AROMAS QUARRY FIRST, PICKETING ALL NIGHT AROUND THE CLOCK.

[97] Q. AND THAT'S WHEN ON WHICH DATE?

[97] A. THAT'S ON TUESDAY, JULY 6TH, I BELIEVE. I DON'T HAVE THE CALENDAR IN FRONT OF ME. IT WAS ON THE DAY AFTER THE HOLIDAY.

[97] Q. AND I WOULD LIKE YOU TO DIRECT YOUR FOCUS, PLEASE, TO IMMEDIATELY AFTER THE NEGOTIATIONS AT 4:00 O'CLOCK IN THE MORNING.

WHO DID YOU SAY ORGANIZED THE MEETING OF THE EMPLOYEES THAT TOOK PLACE BETWEEN 9:00 AND 9:00 O'CLOCK IN THE MORNING?

[97] A. I REQUESTED BRIAN DRISCOLL AND CHRIS NOVAK TO CONTACT THE PEOPLE THAT HAD BEEN SCHEDULED THAT WOULD BE PICKETING AND TO COME DOWN TO THE UNION AS SOON AS POSSIBLE AND THAT I WANTED TO REVIEW THE TENTATIVE AGREEMENT WITH THEM AND I EVEN CONTACTED SOME OF THE MEMBERS MYSELF.

[98] Q. WERE YOU AWARE THAT BY THE CONTRACT TERMS IF IT WASN'T RATIFIED BY 9:00 O'CLOCK, THAT IT WAS EFFECTIVELY WITHDRAWN?

[98] A. I TOOK THE PROPOSAL AND REVIEWED IT WITH THE COMPANY EMPLOYEES AS SOON AS I COULD, AS I AGREED TO DO.

[98] Q. HOW LONG DID THE MEETING LAST?

[98] A. PROBABLY ABOUT AN HOUR.

[98] Q. AND WERE ALL OF THE TERMS OF THE CONTRACT THAT HAD BEEN AGREED UPON OUTLINED TO THE EMPLOYEES?

[98] A. I REVIEWED THE ENTIRE PROPOSAL THAT WAS SUBMITTED TO ME AT APPROXIMATELY 4:00 O'CLOCK IN THE

MORNING, ALONG WITH THE BACK-TO-WORK AGREEMENT THAT THE COMPANY HAD PROPOSED.

I INFORMED THE, THE MEMBERS AND EMPLOYEES OF GRANITE ROCK THAT I HAD SUBMITTED THIS, THIS PROPOSAL WITH FOR THE RETURN-TO-WORK AGREEMENT FOR OUR COUNSEL TO REVIEW AND WAS WAITING FOR A COUNTER PROPOSAL TO FAX UP TO MR. WOOLPERT.

[98] Q. AND I BELIEVE IT'S YOUR TESTIMONY THAT THERE WAS SPECIFIC COVERAGE OF THIS THAT WAS TO BE IN A SIDE LETTER?

[98] A. THAT'S CORRECT, THAT WAS THE LAST PAGE OF THE COMPANY PROPOSAL DATED JULY 2ND.

[98] Q. DID THE EMPLOYEES AGREE TO SUPPORT THAT, THAT IN COMBINATION WITH THE ENTIRE AGREEMENT?

[99] A. NO, THEY DIDN'T, THEY DIDN'T VOTE ON THE ENTIRE AGREEMENT. THEY DIDN'T VOTE ON ANY AGREEMENT.

[99] Q. SO WITH REGARD TO THE SATURDAY WORK, DO YOU HAVE ANY IDEA WHETHER THE EMPLOYEES DID OR DID NOT SUPPORT IT?

[99] A. THE EMPLOYEES SAID THEY DIDN'T HAVE A PROBLEM WITH IT BUT THERE

WAS NO VOTE TAKEN ON THE CONTRACT PERIOD.

[99] Q. DO YOU RECALL TELLING THE EMPLOYEES AT ANY POINT THAT IT LOOKED GOOD WITH REGARD TO THE, WITH REGARD TO THE APPROVAL OF THE TENTATIVE AGREEMENT?

[99] A. I TOLD THEM THAT WE HAD MADE SUBSTANTIAL PROGRESS IN THE NEGOTIATIONS, HOWEVER, IT WAS IMPERATIVE THAT WE HAVE THE RETURN-TO-WORK AGREEMENT IN PLACE BECAUSE IT AFFECTS THE TERMS AND CONDITIONS OF THEIR EMPLOYMENT.

[99] Q. SPECIFICALLY DID YOU RECOMMEND THE TENTATIVE AGREEMENT TO THE MEMBERS?

[99] A. THERE WAS NO RECOMMENDATION OF THE TENTATIVE AGREEMENT WITH THE MEMBERS, THAT'S THEIR RIGHT TO VOTE ON A CONTRACT.

[99] Q. SO YOU MADE NO RECOMMENDATION WITH REGARD TO APPROVAL OR REJECTION OF THE TENTATIVE AGREEMENT?

[100] A. I SAID WE MADE SUBSTANTIAL IMPROVEMENTS ON THE CONTRACT, HOWEVER, I WOULD NOT SUBMIT IT FOR RATIFICATION UNTIL WE HAD A RETURN-TO-WORK AGREEMENT THAT WAS MUTUALLY ACCEPTABLE BY THE PARTIES.

[100] Q. I'D LIKE TO DIRECT YOUR ATTENTION TO THE AFFIDAVIT THAT YOU FILED IN THIS PARTICULAR CASE.

[100] MR. MATHIASON: IT'S AN AFFIDAVIT. I DON'T KNOW IF WE HAVE COPIES BUT IT'S ONE SUPPLIED IN THIS PARTICULAR CASE.

[100] THE COURT: I TAKE IT YOU MEAN A DECLARATION IN OPPOSITION?

[100] MR. BEESON: MR. NETTO HAS THAT BEFORE HIM.

[100] THE COURT: GO AHEAD. WHAT PARAGRAPH?

BY MR. MATHIASON:

[100] Q. IF YOU WOULD SPECIFICALLY LOOK AT PARAGRAPH 3 AND SPECIFICALLY LINE 7 WHERE IT READS ABOUT 4:00 A.M. ON JULY 2ND, MR. WOOLPERT AND I REACHED A TENTATIVE AGREEMENT FOR A NEW CONTRACT THAT I AGREED TO PRESENT TO STRIKING NEW MEMBERS WITH MY RECOMMENDATION FOR APPROVAL. IS THAT A TRUE AND CORRECT STATEMENT?

[100] A YOU KNOW WHAT, I SEE NUMBER 4 HERE BUT IF YOU WOULD LIKE TO SHOW ME EXACTLY WHERE YOU'RE TALKING ABOUT.

[101] Q. PAGE 2, PARAGRAPH 3, IT'S LINE NUMBER 7. IT STARTS WITH THE WORDS ABOUT 4:00 A.M.

[101] A. OKAY.

[101] Q. AND IS THAT SENTENCE TRUE?

[101] A. THAT'S CORRECT. I DID SAY THAT TO MR. WOOLPERT.

[101] Q. AND DID YOU AT THE MEETING AT 9:00 O'CLOCK INDICATED THAT YOU SUPPORTED THE TENTATIVE AGREEMENT?

[101] A. I PRESENTED AND REVIEWED THE TENTATIVE AGREEMENT, BUT IT WASN'T FOR RATIFICATION BECAUSE I DIDN'T HAVE A RETURN-TO-WORK AGREEMENT AT THE TIME AND I TOLD THE COMPANY IT WAS PART AND PARCEL.

[101] Q. DID YOU NONETHELESS SAY THAT YOU SUPPORTED THE TENTATIVE AGREEMENT, YES OR NO?

[101] A. THE ANSWER IS, NO, I TOLD YOU ALREADY, I ANSWERED THAT QUESTION.

[101] Q. DURING THAT MEETING FOR ANY PURPOSE DO YOU RECALL PASSING OUT PIECES OF PAPERS FOR EMPLOYEES TO WRITE DOWN ANYTHING?

[101] A. THAT IS CORRECT, I HAVE ALREADY ANSWERED THAT.

[101] Q. FOLLOWING THE MEETING, WHEN DID YOU FINISH WITH THE MEETING WITH THE EMPLOYEES?

[101] A. IT TOOK PLACE FOR APPROXIMATELY AN HOUR.

[102] Q. AND AT THE CONCLUSION OF THAT MEETING, WHAT DID YOU DO?

[102] A. I TOLD THE EMPLOYEES THAT I WOULD LET THEM KNOW THAT I'M STILL WAITING FOR A RESPONSE FROM MR. WOOLPERT ON A RETURN-TO-WORK AGREEMENT AND THAT AT SUCH TIME THAT WE REACH AN AGREEMENT ON THE RETURN-TO-WORK AGREEMENT, I WILL BE CALLING YOU IN TO RATIFY AND TAKE A VOTE ON THE TENTATIVE AGREEMENT.

[102] Q. AND WHAT DID YOU PHYSICALLY DO AT THE END OF THE MEETING? WHERE DID YOU GO?

[102] A. I WALKED OUT OF THE ROOM.

[102] Q. AND WHERE DID YOU GO?

[102] A. I WENT TO MY OFFICE.

[102] Q. WEREN'T YOU SUPPOSED TO GO TO ALAMEDA FOR NEGOTIATIONS?

[102] A. I WAS SUPPOSED TO BE, THAT'S CORRECT.

[102] Q. AND YOU DIDN'T GO THERE?

[102] A. NO, I DID NOT.

[102] Q. AND WHY DIDN'T YOU GO THERE?

[102] A. BECAUSE I HAD BEEN UP ALL NIGHT AND I WAS HOPING TO GET THIS

RETURN-TO-WORK AGREEMENT DONE SO THAT I COULD GET THE CONTRACT RATIFIED.

[102] Q. NOW, IF YOU WERE SUPPOSING TO GET THE RETURN-TO-WORK AGREEMENT DONE, YOU KNEW THAT BRUCE WOOLPERT WAS GOING TO BE AT THAT MEETING?

[103] A. THAT'S CORRECT.

[103] Q. AND WOULD IT HAVE MADE SENSE JUST TO GO THERE WITH THE BACK-TO-WORK AGREEMENT AND SAY, BRUCE, HERE IT IS, LET'S GET IT SIGNED?

[103] A. IT COULD HAVE BEEN.

[103] Q. SO INSTEAD WHAT YOU DID WAS YOU FAXED IT TO THE OPERATING ENGINEERS LOCAL 3?

[103] A. THAT'S CORRECT.

[103] Q. AND DO YOU HAVE ANY KNOWLEDGE AS TO WHETHER IT EVER GOT TO MR. WOOLPERT?

[103] A. AT THIS TIME, NO, I DON'T.

[103] Q. YOU TESTIFIED THAT YOU MIGHT HAVE CALLED MR. WOOLPERT THAT AFTERNOON; IS THAT YOUR TESTIMONY?

[103] A. WHAT AFTERNOON ARE YOU REFERRING TO, SIR?

[103] Q. SPECIFICALLY ON THE 2ND OF JULY?

[103] A. JULY 2ND ON FRIDAY?

[103] Q. CORRECT.

[103] A. YEAH, I COULD HAVE CALLED HIM.

[103] Q. AND THIS WOULD HAVE BEEN ON YOUR CELL PHONE?

[103] A. THAT WOULD BE CORRECT.

[103] Q. AND DO YOU THINK IT MIGHT HAVE BEEN AT OR ABOUT 4:00 O'CLOCK, 4:30, 4:45?

[103] A. SOME TIME LATE IN THE AFTERNOON, THAT'S CORRECT.

[104] Q. AND DID YOU REACH HIM?

[104] A. AGAIN, I CAN'T RECALL WHETHER I CALLED HIM OR NOT. I'M NOT REALLY SURE IF I CALLED HIM. IF I DID, IT WOULD HAVE BEEN IN REFERENCE TO HAVE YOU HAD THE OPPORTUNITY TO REVIEW THE RETURN-TO-WORK AGREEMENT AND WHERE ARE WE AT WITH THIS?

[104] Q. AND SO YOUR BEST RECOLLECTION IS THAT YOU'RE NOT SURE IF YOU HAD IT BUT IF YOU DID AND IF YOU TALKED TO HIM, THE ONLY THING THAT YOU WOULD HAVE SAID TO HIM WAS HAVE YOU HAD A CHANCE TO REVIEW THE BACK-TO-WORK AGREEMENT?

[104] A. THAT'S CORRECT.

[104] Q. AND DO YOU THINK YOU COULD HAVE USED WORDS IN CONVERSATIONS LIKE THAT, WELL, NOW THAT WE HAVE THE CONTRACT BEHIND US, LET'S LOOK AT THE BACK-TO-WORK AGREEMENT AND SEE IF WE CAN GET IT RESOLVED?

[104] A. ABSOLUTELY NOT.

[104] Q. YOU NEVER WOULD HAVE SAID ANYTHING ABOUT THE CONTRACT BEING BEHIND YOU?

[104] A. NEVER.

[104] Q. EVEN THOUGH THIS WAS THE SAME PROCEDURE THAT YOU HAD USED IN GILROY, A LITTLE MORE THAN A YEAR EARLIER?

[104] A. NEVER.

[105] Q. BUT YOU'RE PRETTY SURE NOW THAT YOU MIGHT OR MIGHT NOT HAVE HAD THE TELEPHONE CALL?

[105] A. AGAIN, MY PHONE RECORDS WILL SPEAK FOR THEMSELVES. I'M NOT GOING TO DENY IF I DID CALL BUT AT NO POINT HAD I EVER TOLD BRUCE WOOLPERT OR ANY EMPLOYEE OF GRANITE ROCK THAT THE CONTRACT HAD BEEN RATIFIED.

[105] Q. IS IT POSSIBLE, IS IT POSSIBLE THAT WHAT YOU SAID TO BRUCE WOOLPERT WAS THAT THE CONTRACT IS FINE, IT'S BEEN APPROVED, AND IN YOUR MIND THINKING

YOU WEREN'T SAYING ANYTHING ABOUT RATIFIED, YOU'RE JUST SAYING—

[105] A. NO.

[105] Q. THOSE WORDS WOULDN'T HAVE BEEN USED?

[105] A. ABSOLUTELY NOT, NO.

[105] Q: THE NEXT MORNING IS IT YOUR RECOLLECTION THAT YOU MADE A PHONE CALL TO BRUCE WOOLPERT?

[105] A. ABSOLUTELY.

[105] Q. ABSOLUTELY?

[105] A. ABSOLUTELY POSITIVE.

[105] Q. AND DID YOU REACH HIM?

[105] A. YES, I DID.

[105] Q. AND ABOUT WHAT TIME WAS THAT?

[105] A. IT WAS APPROXIMATELY 8:30, 8:40 A.M. ON SATURDAY, JULY 3RD.

[106] Q. AND DO YOU KNOW WHETHER YOU REACHED HIM?

[106] A. I BELIEVE I REACHED HIM ON HIS CELL PHONE BECAUSE HE SAID HE WAS GOING OVER TO THE CORPORATE OFFICE AND HE WOULD BE AROUND THE CORPORATE

OFFICE IN AROMAS FOR THE POPS AND ROCKS CONCERT THAT WEEKEND.

[106] Q. WHICH WOULD HAVE BEEN SATURDAY MORNING?

[106] A. THAT'S CORRECT, BETWEEN 8:30 AND 8:40 A.M.

[106] Q. AND YOU'RE POSITIVE IT'S SATURDAY MORNING?

[106] A. 100 PERCENT POSITIVE IT WAS SATURDAY MORNING.

[106] Q. BUT YOU'RE NOT 100 PERCENT POSITIVE WHETHER YOU TALKED TO HIM ON FRIDAY AFTERNOON?

[106] A. RIGHT NOW I CAN'T RECOLLECT WHETHER I TALKED TO HIM FRIDAY NIGHT, BUT IF I DID, IT WOULD HAVE BEEN ABOUT THE RETURN-TO-WORK AGREEMENT.

[106] Q. WHEN WAS THE FIRST TIME THAT YOU HEARD BACK FROM MR. WOOLPERT ON THE RETURN TO WORK AGREEMENT?

[106] A. IT WASN'T UNTIL I RECEIVED A PHONE MESSAGE IN MY OFFICE ON TUESDAY MORNING PROBABLY 6:45 OR SOME TIME THEREABOUTS QUESTIONING WHY THE EMPLOYEES AT SAN JOSE CONCRETE, FIRST OF ALL, HE SAID HE WAS DISAPPOINTED AND HE COULDN'T UNDERSTAND WHY THE EMPLOYEES AT THE SAN JOSE CONCRETE FACILITY HADN'T RETURNED TO WORK.

THAT'S THE FIRST I HEARD FROM AND I CALLED HIM AND AS SOON AS I RECEIVED THAT MESSAGE AND SAID, BRUCE, WE'VE HAD ALL WEEKEND TO WORK ON THIS RETURN TO WORK AGREEMENT, YOUR CONTRACT HAS NOT BEEN RATIFIED, NOR WILL IT BE RATIFIED UNTIL SUCH TIME THAT WE REACH MUTUAL AGREEMENT ON THE RETURN—TO—WORK AGREEMENT. DO YOU HAVE IT?

AND HE MENTIONED, AS HE STATED HERE, THAT HE RECEIVED IT ON HIS E—MAIL AND THAT HE WOULD REVIEW IT AND GET BACK TO ME.

[107] Q. AND DO YOU RECALL IN THAT SAME CONVERSATION INDICATING TO YOU THAT FROM HIS PERSPECTIVE YOU ALREADY HAD A CONTRACT?

[107] A. NO.

[107] Q. SO HE DIDN'T SAY ANYTHING TO INDICATE THAT, THAT HE ALREADY BELIEVED THAT A CONTRACT WAS IN PLACE?

[107] A. NO, NO.

[107] Q. AND THIS WAS ON WHICH DATE?

[107] A. THIS WAS ON JULY 6TH, AT PROBABLY CLOSE TO 8:00 O'CLOCK IN THE MORNING, 8:30 IS WHEN I, WHEN I MADE THE PHONE CALL TO HIM.

[107] Q. AND WHEN WAS THE FIRST TIME THAT YOU LEARNED THAT MR. WOOLPERT

WAS TAKING THE POSITION THAT IN FACT THE CONTRACT HAD BEEN RATIFIED?

[107] A. WHEN I RECEIVED HIS LETTER ON JULY 6TH SAYING THAT, THAT HIS FAX MACHINE ONLY WORKED BETWEEN 7:00 A.M. AND 7:00 P.M. MONDAY THROUGH FRIDAY BUT, HOWEVER, HE REALIZED THAT THERE WAS SOMETHING SITTING THERE AND HE WOULD HAVE A CHANCE TO LOOK AT IT AND THAT HE NOW HAD IT, BUT HE DIDN'T MENTION ANYTHING IN HIS LETTER ABOUT, ABOUT THE FAX THAT I SENT TO HIM PERSONALLY AT 8:55 A.M. ON SATURDAY, JULY 3RD PER HIS REQUEST.

[108] Q. AND THIS FAX WAS A COPY OF THE BACK-TO-WORK AGREEMENT?

[108] A. THAT IS CORRECT.

[108] Q. AND YOU DON'T KNOW WHETHER THAT WENT INTO E-MAIL OR NOT?

[108] A. ALL IT SAID WAS OKAY, CONFIRMATION, TWO PAGES AT 8:55 A.M. ON SATURDAY, JULY 3RD.

[108] Q. MR. NETTO, IF YOU MAKE A COMMITMENT TO DO SOMETHING WITH REGARD TO AN EMPLOYER AT THE BARGAINING TABLE, DO YOU TAKE THAT COMMITMENT SERIOUSLY?

[108] A. ABSOLUTELY.

[108] Q. THIS WOULD INCLUDE BOTH VERBAL AGREEMENTS AND WRITTEN AGREEMENTS; CORRECT?

[108] A. SURE.

[108] Q. AND WOULD THAT INCLUDE YOUR AGREEMENT TO TAKE THE MATTER OUT FOR RATIFICATION BY 9:00 O'CLOCK?

[109] A. THAT WAS CONDITIONED ON WE HAD AN ACCEPTABLE RETURN-TO-WORK AGREEMENT AS I STATED EARLIER.

[109] Q. AND THAT CONDITIONING, AS YOU DESCRIBED IT, IS STRICTLY VERBAL, IT WASN'T IN ANY OF THE WRITTEN MATERIAL; CORRECT?

[109] A. YEAH, BECAUSE I DIDN'T HAVE A COMPUTER OR ANYTHING TO TYPE UP WITH AND THAT'S WHEN THE EMPLOYER HANDED ME THEIR RETURN-TO-WORK AGREEMENT.

[109] Q. AND WASN'T IT TRUE THAT THE RATIFICATION PROVISION CONTINGENT UPON RATIFICATION WAS IN EVERY SINGLE ONE OF THEIR PROPOSALS?

[109] A. THAT WASN'T AGREED UPON BY THE UNION. WE NEVER AGREED UPON A TIME LINE WHEN THIS HAD TO BE DONE. HIS FIRST PRIORITY WAS TO GET THE PICKETS REMOVED.

[109] Q. YOU HADN'T AGREED TO TRY TO GET THIS DONE BY 6:00 O'CLOCK?

[109] A. I AGREED I WOULD GET IT DONE AS SOON AS POSSIBLE, BUT AS I SAID.

[109] THE COURT: THIS HAS GONE IN CIRCLES NOW FOR A WHILE. CAN WE BRING THIS TO A CLOSE?

[109] MR. MATHIASON: YES, I HAVE NO FURTHER QUESTIONS.

[109] THE COURT: DO YOU HAVE ANY FURTHER QUESTIONS?

[110] MR. BEESON: NO. I'D LIKE TO INTRODUCE A ONE-PAGE DOCUMENT INTO EVIDENCE AND HAVING IT FIRST IDENTIFIED BY THE WITNESS.

[110] THE COURT: VERY WELL. GO AHEAD.

[110] MR. BEESON: AND I APOLOGIZE THAT I DO NOT HAVE COPIES, BUT I CAN MAKE THEM.

[110] MR. BEESON: HOW DO YOU WANT IT MARKED?

[110] THE COURT: THIS WOULD BE EXHIBIT D

(WHEREUPON, DEFENDANT'S EXHIBIT NUMBER D WAS MARKED FOR IDENTIFICATION.)

REDIRECT EXAMINATION

BY MR. BEESON:

[110] Q. LET ME SHOW THE WITNESS AND DO YOU RECOGNIZE THAT?

[110] A. YES, I DO.

[110] Q. AND CAN YOU EXPLAIN WHAT IT IS?

[110] A. WHAT THIS IS IS THAT THIS IS A CONFIRMED COPY OF OUR LOG FROM OUR FAX MACHINE THAT ON JULY 3RD AT 8:55 A.M. A FAX SENT TO AND YOU HAVE TO PUT THE NUMBER ONE BEFORE THE AREA CODE, 1-831-768-2201 IS THE IDENTIFICATION NUMBER. THIS WAS FAXED TO THE DURATION WAS 56 SECONDS, PAGES WAS 2, AND RESULTS IS OKAY CONFIRMING THAT THERE WAS A FAX SENT FROM LOCAL 287.

[110] Q. AND WHAT WAS THAT FAX IF YOU RECALL?

[111] A. THAT FAX WAS A COPY OF THE RETURN-TO-WORK AGREEMENT THAT I FAXED TO THE OPERATING ENGINEERS OFFICE AT 10:00 A.M. ON FRIDAY, JULY 2ND.

[111] Q. WHY DID YOU FAX IT AGAIN TO THE OPERATING ENGINEERS OFFICE?

[111] A. BECAUSE I KNEW MR. WOOLPERT WAS GOING TO BE PRESENT IN NEGOTIATIONS AND I FELT THAT THIS WAS THE MOST CRITICAL SITUATION SINCE WE HAD BEEN ON STRIKE AND NEEDED TO GET RESOLVED.

[111] MR. BEESON: MOVE THE ADMISSION OF THE EXHIBIT.

[111] THE COURT: D IS IN EVIDENCE.

(WHEREUPON, DEFENDANT'S EXHIBIT NUMBER D, HAVING BEEN PREVIOUSLY MARKED FOR IDENTIFICATION, WAS ADMITTED INTO EVIDENCE.)

[111] MR. BEESON: I HAVE NOTHING FURTHER.

[111] THE COURT: VERY WELL. YOU MAY STEP DOWN.

[111] MR. BEESON: I WILL MAKE ARRANGEMENTS AFTERWARDS FOR COPIES.

[111] THE COURT: THERE'S AN OFFER TO HAVE REBUTTAL TESTIMONY, BUT I DON'T BELIEVE IT'S NECESSARY.

DO YOU WISH TO MAKE A FURTHER PROFFER WITH RESPECT TO THAT?

[112] MR. MATHIASON: WELL, YOUR HONOR, VERY BRIEF TESTIMONY FROM MR. WOOLPERT I THINK WOULD BE APPROPRIATE AND THEN I WOULD MAKE AN OFFER OF TESTIMONY FROM SHIRLEY OW THAT IF SHE WERE CALLED TO TESTIFY THAT SHE WOULD CONFIRM THAT DURING THE MEETING BETWEEN 9:00 O'CLOCK IN THE EVENING ON JULY 1ST AND 4:00 O'CLOCK IN THE MORNING ON THE 2ND OF JULY AT NO TIME WAS THERE ANY CONDITIONING WHATSOEVER BY 287 RATIFICATION OR APPROVAL OF THE

CONTRACT UPON THE BACK-TO-WORK AGREEMENT. SHE WOULD TESTIFY TO THAT AND IN SPECIFIC OPPOSITION IT WAS MR. NETTO TESTIFIED TO.

SHE WOULD FURTHER TESTIFY THAT AT APPROXIMATELY 6:00 O'CLOCK IN THE EVENING ON THE 2ND OF JULY THAT SHE WAS CONTACTED BY BRUCE WOOLPERT WHO SAID HE HAD GOTTEN A CALL FROM MR. NETTO INDICATING THAT THE CONTRACT HAD BEEN RATIFIED AND THAT PEOPLE WOULD BE BACK TO WORK AND THAT THEY WERE GOING TO WORK OUT THE BACK-TO-WORK AGREEMENT BETWEEN JULY, WEDNESDAY AND THURSDAY OF THE FOLLOWING WEEK.

[112] THE COURT: VERY WELL. I'LL TAKE THAT AS YOUR PROFFER.

WHAT IS IT THAT YOU WOULD WISH TO CALL MR. WOOLPERT BACK FOR?

[113] MR. MATHIASON: THE CIRCUMSTANCES SURROUNDING THIS FESTIVAL ON THE 4TH OF JULY TO DEMONSTRATE THAT IT HAD VERY LITTLE TO NOTHING TO DO WITH THE ACTIVITY TAKING PLACE WITH TEAMSTERS 287 BUT INVOLVED AN ENTIRELY DIFFERENT SET OF CIRCUMSTANCES.

[113] THE COURT: VERY WELL. THE COURT APPRECIATE THE PROFFER BUT DOESN'T FEEL IT IS NECESSARY FOR PURPOSES OF THE ISSUE BEFORE THE COURT TO HAVE THAT TESTIMONY, AND THEREFORE, I'M

GOING TO ORDER THAT THIS MATTER BE SUBMITTED TO THE COURT FOR DECISION WITH RESPECT TO THE QUESTION PRESENTLY BEFORE THE COURT, NAMELY, WHETHER OR NOT THERE ARE CIRCUMSTANCES WHICH WOULD JUSTIFY GRANTING INJUNCTIVE RELIEF TO ENJOIN THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS FREIGHT CONSTRUCTION, GENERAL DRIVERS, HELPERS LOCAL 287 FROM THREATENING, CAUSING, DIRECTING, ASSISTING, PARTICIPATING OR ENGAGING IN ANY STRIKE, SLOW DOWN, OR OTHER CONCERTED REFUSAL TO PERFORM WORK UNDER THE TERMS AS SET FORTH IN THE PROPOSED TEMPORARY RESTRAINING ORDER AND IN RESPONSE TO A REQUEST FOR AN ORDER TO SHOW CAUSE WHY THEY SHOULDN'T BE SO ENJOINED PENDING THIS LAWSUIT.

THE COURT HAS HAD THE BENEFIT OF HEARING THE TESTIMONY FROM THE TWO PRINCIPAL INDIVIDUALS WHO WERE INVOLVED IN PERSONAL CONVERSATIONS AND TELEPHONE CONVERSATIONS WITH RESPECT TO THIS QUESTION OF RATIFICATION. I INTEND MY COMMENTS HERE ON THE RECORD TO CONSTITUTE MY FINDINGS OF FACT AND MY CONCLUSIONS OF LAW ON THIS MATTER AND YOU MAY REQUEST A TRANSCRIPT OF THESE PROCEEDINGS IF YOU WISH TO HAVE A WRITTEN FINDING WITH RESPECT TO THESE MATTERS.

THIS, OF COURSE, IS A CIRCUMSTANCE WHICH IS NOT UNUSUAL IN THE GIVE AND TAKE OF CONVERSATIONS BETWEEN INDIVIDUALS.

THESE WERE INDIVIDUALS WHO HAVE HAD A LONG WORKING RELATIONSHIP WITH ONE ANOTHER OVER THE COURSE OF TIME AND WHAT OCCURRED HERE, THE COURT FINDS, IS THAT THEY REACHED A TENTATIVE AGREEMENT TO A LABOR DISPUTE WHICH HAD EXISTED BETWEEN GRANITE ROCK AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS AND IT WAS THEIR AGREEMENT THAT THIS TENTATIVE AGREEMENT WOULD NOT BE EFFECTIVE UNTIL IT WAS RATIFIED WHICH THEY UNDERSTOOD TO MEAN THAT IT WOULD BE SUBMITTED TO THE MEMBERS OF THE LOCAL 287 FOR THEIR VOTE FOR APPROVAL.

DURING THE COURSE OF CONCLUDING TENTATIVE APPROVAL, AND MY UNDERSTANDING IS THAT THE TENTATIVE AGREEMENT WAS NOT SIGNED BY ANYONE, I HAVEN'T BEEN PRESENTED WITH ANY SIGNED DOCUMENTS BUT IT'S GOING TO BE REDUCED TO WRITING AT SOME LATER POINT IN TIME.

DURING THE COURSE OF THOSE NEGOTIATIONS THERE WAS BROUGHT UP A QUESTION OF A BACK—TO—WORK AGREEMENT.

NOW, I UNDERSTAND A BACK-TO-WORK AGREEMENT TO HAVE BEEN A NATURAL

THING FOR THE PARTIES TO DISCUSS IN THIS CASE BECAUSE THEY HAD AN ONGOING BUSINESS RELATIONSHIP AND THE NEW CONTRACT WAS GOING TO GOVERN THEIR RELATIONSHIP INTO THE FUTURE. THE BACK—AT—WORK AGREEMENT, BEING A SETTLEMENT OF THE SUBSISTING DISPUTE THAT WAS GOING ON AND THE CIRCUMSTANCES UNDER WHICH PEOPLE WOULD COME BACK TO WORK, WOULD RESOLVE ANY GRIEVANCES THAT HAD OCCURRED WITH RESPECT TO THE STRIKE AND IT SEEMS TO ME TO HAVE BEEN AN IMPORTANT PART OF BRINGING THIS DISPUTE TO A CONCLUSION.

WHAT FOLLOWED IS A SERIES OF EVENTS THAT TOOK PLACE WHERE THE AGENT FOR THE UNION WENT ABOUT TRYING TO EXPLAIN TO THE UNION REPRESENTATIVES WHAT HAD OCCURRED AND TO SEEK THEIR APPROVAL, BY APPROVAL USING THE TERM "RATIFICATION" OF THE NEW COLLECTIVE BARGAINING AGREEMENT.

HE TESTIFIED THAT HE ADVISED THE MANAGEMENT AND HE ADVISED THE UNION MEMBERS THAT THERE WOULD BE NO RATIFICATION WITHOUT A BACK-TO-WORK AGREEMENT AND SO FAR AS THE COURT HAS FOUND THERE HASN'T BEEN ANY EVIDENCE OF A RATIFICATION BY THE RANK AND FILE OF THE NEW COLLECTIVE BARGAINING AGREEMENT.

THERE WERE PROPOSALS SUBMITTED BY GRANITE ROCK TO THE UNION OF A BACK-TO-

WORK AGREEMENT. THE COURT NOTES THAT THE BACK-TO-WORK AGREEMENT, WHICH WAS SUBMITTED OVER THE SIGNATURE OF SHIRLEY OW, AND AGAIN, I DON'T KNOW WHETHER THIS WAS SIGNED OR NOT, A COPY THAT WAS GIVEN TO THE COURT WAS NOT SIGNED. THIS IS A PROPOSED BACK-TO-WORK AGREEMENT.

ON THE VERY TERMS OF THE BACK-TO-WORK AGREEMENT IT SAYS: TEAMSTERS LOCAL 287 AGREES TO CONDUCT A RATIFICATION MEETING ON FRIDAY, JULY 2, 2004, NO LATER THAN 6:00 O'CLOCK P.M. IN ORDER FOR EMPLOYEES TO RETURN TO WORK AS SOON AS POSSIBLE IF RATIFIED.

UNION SHALL NOTIFY MANAGEMENT OF THE RATIFICATION OUTCOME AS SOON AS IT IS REACHED. SO RATIFICATION WAS NOT ONLY PART OF THE NEW LABOR MANAGEMENT CONTRACT, IT WAS PART OF THE BACK-TO-WORK AGREEMENT.

WHEN THAT'S SUBMITTED TO COUNSEL FOR THE UNION, THE UNION, THROUGH ITS COUNSEL, PREPARED A BACK-TO-WORK COUNTER PROPOSAL ON THE VERY TERMS OF THE COUNTER PROPOSAL. IT SAYS THE COMPANY'S CURRENT PROPOSAL FOR THE AGREEMENT, WHICH IS THE NEW LABOR MANAGEMENT COLLECTIVE BARGAINING AGREEMENT, WILL BE SUBMITTED BY THE UNION WITH ITS RECOMMENDATION FOR RATIFICATION FOR ITS EFFECTIVE MEMBERSHIP IMMEDIATELY UPON BUT NOT

BEFORE THE EXECUTION OF THIS BACK-TO-WORK AGREEMENT.

SO AGAIN, THE RATIFICATION BECAME PART OF NOT ONLY THE COLLECTIVE BARGAINING AGREEMENT BUT THE BACK-TO-WORK AGREEMENT. FOR VARIOUS REASONS THE BACK-TO-WORK AGREEMENT WAS NEVER EXECUTED AND SIGNED AND SO THE RATIFICATION VOTE THAT WOULD HAVE BEEN PART OF WHAT WAS INTENDED BY THE PARTIES TO TAKE PLACE NEVER TOOK PLACE.

SO WE THEN COME TO THE QUESTION OF WHETHER OR NOT MR. NETTO TOLD MR. WOOLPERT THAT THE COLLECTIVE BARGAINING AGREEMENT HAD BEEN RATIFIED EVEN THOUGH THE EVIDENCE IS THAT IT HAD NOT BEEN.

MR. NETTO IS, AS FAR AS THE COURT IS CONCERNED, HONESTLY TRYING TO GIVE HIS BEST RECOLLECTION OF THE EVENTS AND SO IS THE UNION REPRESENTATIVE, MR. NETTO. SO BOTH MR. WOOLPERT AND MR. NETTO ARE TRYING TO GIVE US THEIR RECOLLECTIONS OF THOSE VARIOUS CONVERSATIONS.

IT IS INTERESTING FOR THE COURT TO NOTE THAT MR. WOOLPERT DESCRIBED MR. NETTO'S WORDS FOUR SEPARATE TIMES AND ON ALL FOUR OCCASIONS USED DIFFERENT WORDS TO DESCRIBE WHAT MR. NETTO TOLD HIM.

THE FIRST TIME THAT HE WAS ASKED WHAT MR. NETTO HAD SAID MR. WOOLPERT SAID

THAT AN AGREEMENT HAD BEEN REACHED AND NOW WE MUST WORK ON THE BACK-TO-WORK AGREEMENT.

NOW, THAT COULD VARIOUSLY BE A DESCRIPTION THAT THERE WAS THIS TENTATIVE AGREEMENT BUT THE TERM RATIFIED WAS NOT USED THAT FIRST TIME.

THE SECOND TIME HE WAS ASKED ABOUT IT MR. WOOLPERT SAID MR. NETTO TOLD HIM AND SAID IT HAD BEEN APPROVED, WHICH GETS CLOSER TO RATIFICATION BUT STILL IS NOT THE WORD RATIFICATION.

THE THIRD TIME HE WAS ASKED ABOUT IT, MR. WOOLPERT SAID MR. NETTO SAID IT WAS RATIFIED.

AND THE FOURTH TIME HE DESCRIBED IT HE SAID THAT THE AGREEMENT WAS ACCEPTED.

NOW, I DON'T MEAN TO MIX WORDS HERE BUT IT DOES SEEM TO ME THAT I HAVE TO BALANCE THAT TESTIMONY WHERE HE'S USING VARIOUS WORDS TO TRY TO EXPRESS THE INTENT THAT WHAT MR. NETTO WAS SAYING TO HIM HAS TO BE WEIGHED AGAINST MR. NETTO'S TESTIMONY WHERE HE SAID UNEQUIVOCALLY, I DID NOT SAY THAT IT HAD BEEN RATIFIED; THERE WAS TENTATIVE AGREEMENT AND THAT WE HAD TO WORK ON THIS BACK-TO-WORK AGREEMENT.

BUT HE SAYS I NEVER TOLD HIM THAT IT WAS RATIFIED, AND INDEED, IF INDEED IT IS TRUE

THAT THE PROPOSED BACK-TO-WORK AGREEMENT WAS BEING SUBMITTED FROM THE UNION BACK TO GRANITE ROCK ON THE FACE OF THAT PROPOSAL WHICH WAS BEING TRANSMITTED ON MONDAY, THE FIRST DAY THAT EVERYBODY WAS SUPPOSED TO GO BACK TO WORK IT SAYS ON ITS FACE THAT IT HAD TO BE SIGNED BEFORE THERE WOULD BE RATIFICATION OF THE NEW COLLECTIVE BARGAINING AGREEMENT. IT COULD BE THAT MR. WOOLPERT DIDN'T SEE THIS BECAUSE IT WAS SENT BY A TRANSMISSION MEANS THAT DEPRIVED HIM OF IT, BUT IT'S CLEAR TO THE COURT AND THE COURT FINDS THAT THERE WAS NO COMMUNICATION OF RATIFICATION BY MR. NETTO AND THERE HAVING BEEN NO RATIFICATION, THERE IS CURRENTLY NO COLLECTIVE BARGAINING AGREEMENT BETWEEN GRANITE ROCK AND TEAMSTERS LOCAL 287, AND THEREFORE, THE COURT IS NOT IN A POSITION OF ENJOINING THEIR CONTINUING STRIKE IN PURSUIT OF A COLLECTIVE BARGAINING AGREEMENT.

HAVING MADE THAT CONCLUSION, I WANT TO URGE BOTH SIDES THAT YOU ARE A VERY SHORT WAY FROM CONCLUDING A COLLECTIVE BARGAINING AGREEMENT AND A BACK-TO-WORK AGREEMENT.

THE COURT IS AT A LOSS TO UNDERSTAND WHY THOSE EFFORTS CEASED SIMPLY BECAUSE PEOPLE WERE STILL ON THE PICKET LINE ON JULY 6TH. IF THERE WERE THE LANGUAGE IN THE BACK-TO-WORK AGREEMENT THAT NEEDED TO BE WORKED

OUT, YOU'RE ALL ENLIGHTENED PEOPLE, YOU KNOW THAT YOU HAVE THE INTEREST OF PEOPLE WHO NEED TO WORK FOR A LIVING AT HEART, THE WELFARE OF THE GRANITE ROCK COMPANY IS AT HEART, AND IT PERHAPS DOESN'T ESCAPE YOU ALL THAT WE LIVE IN PRETTY TOUGH ECONOMIC TIMES RIGHT NOW AND SO THIS IS NOT AN OCCASION WHERE WINNING THE TORCH, OR WINNING THE TROPHY, OR WINNING THE PRIZE, OR BEING THE ONE TO SAY WHATEVER IS THE IMPORTANT ISSUE.

WHAT IS IMPORTANT HERE IS TO BRING THIS MATTER TO A CONCLUSION AS QUICKLY AS POSSIBLE AND SUCCESSFULLY AND IN THE INTEREST OF EVERYONE CONCERNED, AND AS I SAY IN MY VIEW YOU'RE VERY CLOSE TO IT.

BUT I AM PERSUADED THAT THERE IS NO VIOLATION OF THE LABOR MANAGEMENT RELATION ACT. JUDGMENT IS ENTERED IN FAVOR OF THE DEFENDANT THE INTERNATIONAL BROTHER OF TEAMSTERS LOCAL 287. THE PLAINTIFF TAKES NOTHING BY WAY OF THIS COMPLAINT. THE WHOLE MATTER IS DISMISSED.

THANK YOU ALL VERY MUCH.

(WHEREUPON, THE EVENING RECESS WAS TAKEN.)

[Dated July 26, 2004]

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA
SAN JOSE DIVISION

Granite Rock Company, Plaintiff(s), v. Teamsters Local 287, Defendant(s).	NO. C 04-02767 JW JUDGMENT

In this labor dispute between Plaintiff Granite Rock Company ("Granite Rock") and Defendant International Brotherhood of Teamsters, Freight, Construction, General Drivers, Warehousemen And Helpers, Local 287 ("Union"), Granite Rock sought a temporary restraining order prohibiting the Union from continuing its strike. The Court conducted a hearing on July 26, 2004, at which time the Court ordered the trial of the action on the merits to be advanced and consolidated with the hearing on the application pursuant to Rule 65(a)(2), Fed.R.Civ.P.

During the trial on the merits the parties questioned two witnesses: Mr. Woolpert of Granite Rock, and Mr. Netto of the Union. The Court thereafter stated findings of fact and conclusions of law on the record. In accordance with those findings of fact and conclusions of law, the Court enters judgment in

favor of the Union and against Granite Rock. The Clerk shall close the file.

Dated: July 26, 2004

/s/ James Ware

JAMES WARE

United States District Judge

[Dated August 9, 2004]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

GRANITE ROCK COMPANY,

Plaintiff,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, FREIGHT, CONSTRUCTION, GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 287 (AFL-CIO), and DOES .1 through 20, inclusive,

Defendants.

Case No. C 04 2767 JW

NOTICE OF MOTION, MOTION, AND MEMORANDUM OF POINTS OF AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR NEW TRIAL PURSUANT TO RULE 59(a) OR, IN THE ALTERNATIVE, MOTION TO VACATE DISMISSAL OF THE FIRST AMENDED COMPLAINT

PURSUANT TO RULE 59(a), (e) AND/OR RULE 60(b)

Date: September 13, 2004
Time: 9:00 a.m.
Judge: The Honorable James Ware
Courtroom: 8

NOTICE OF MOTION AND MOTION

TO DEFENDANT INTERNATIONAL BROTHERHOOD OF TEAMSTERS, FREIGHT, CONSTRUCTION, GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 287 (AFL-CIO):

PLEASE TAKE NOTICE that on September 13, 2004, at 9:00 a.m. in Courtroom 8 of the United States District Court, Northern District of California, located at 280 South First Sheet, San Jose, California, Plaintiff Granite Rock Company ("Plaintiff' or "Granite Rock") will, and hereby does, move this Court for an order granting Granite Rock a new trial as to the claims set forth in the First Amended Complaint, including Granite Rock's application for a temporary restraining order, or, in the alternative, for an order vacating dismissal of Granite Rock's First Amended Complaint.

Plaintiff's Motion is based upon this Notice of Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Alan S. Levin, Esq. ("Levin Decl."), Declaration of Garry a Mathiason, Esq. ("Mathiason Decl."), the Declaration of Richard W. Walrod ("Walrod Decl."), the Declaration of Bruce Woolpert ("Woolpert Decl."), oral argument of counsel at the hearing, and all the relevant pleadings on file with the Court.

STATEMENT OF THE ISSUES

1. Whether Granite Rock is entitled to a new trial, including Granite Rock's application for a

temporary restraining order, on the basis of newly-discovered evidence.

2. Whether the dismissal of Plaintiff's First Amendment Complaint must be vacated, on the grounds that there was no clear and unambiguous notice to the parties of the intent to consolidate the application for a temporary restraining order and trial of the case on the merits with respect to the entire case, including issues with regard to damages.

3. Whether the dismissal of the First Amended Complaint must be vacated, on the grounds that Granite Rock has not had full and fair opportunity to conduct discovery and present its entire case on the merits to the Court.

4. Whether the dismissal of the First Amended Complaint must be vacated, on the grounds that an application for a temporary restraining order cannot be consolidated with a trial of the entire case on the merits.

Dated: August 9, 2004

Respectfully submitted,

LITTLER MENDELSON
A Professional Corporation

/s/
GARRY G. MATHIASON
Attorneys for Plaintiff
GRANITE ROCK
COMPANY

[Dated August 9, 2004]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

GRANITE ROCK COMPANY,

Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, FREIGHT, CONSTRUCTION, GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 287 (AFL-CIO), and DOES 1 through 20, inclusive,

Defendants.

Case No. C 04 2767 JW

DECLARATION OF ALAN S. LEVINS IN SUPPORT OF PLAINTIFF'S MOTION FOR NEW TRIAL PURSUANT TO RULE 59(a) OR, IN THE ALTERNATIVE, MOTION TO VACATE DISMISSAL OF THE FIRST AMENDED COMPLAINT PURSUANT TO RULE 59(a), (e) AND/OR RULE 60(b)

Date: September 13, 2004

Time: 9:00 a.m.

Judge: The Honorable James Ware

Courtroom: 8

I, Alan S. Levins, hereby declare and state:

1. I am a shareholder in the law firm of Littler Mendelson, a Professional Corporation, counsel of record for Plaintiff Granite Rock Company ("Granite Rock"). I am licensed to practice before the courts of the State of California. I make this declaration based on my own personal knowledge, and, if called as a witness, I could and would testify competently thereto.

2. I am informed and believe that on July 9, 2004, Granite Rock filed its Complaint for Damages.

3. I am informed and believe that on July 22, 2004, Granite Rock filed its First Amended Complaint and its Application for a Temporary Restraining Order.

4. On July 26, 2004, the Application for the Temporary Restraining Order was heard before Judge Ware.

5. On July 26, 2004, I appeared on behalf of Granite Rock for the sole purpose of obtaining a temporary restraining order. No other issues were set for that hearing or noticed.

6. On July 26, 2004, when Judge Ware discussed "consolidation", given the context of the discussion, I understood him to mean consolidation of the hearing on the temporary restraining order with a hearing on a preliminary injunction.

7. On July 26, 2004, when Judge Ware discussed "merits", given the context of the discussion, I understood him to mean the merits of Granite Rock's

request for injunctive relief. For example, the Court had before it an affidavit from Plaintiff's Chief Executive Officer, Bruce Woolpert, describing a telephone conference on Friday July 2, 2004, in the afternoon, communicating that the collective bargaining agreement had been ratified. The Defendant Union's Business Agent had submitted a counter-affidavit denying that any telephone conversation or other conversation took place that afternoon (July 2), and claiming that at no time did he inform Mr. Woolpert that the tentative agreement had been ratified. It was my understanding that the Court needed to resolve that conflict to rule on injunctive relief. It was not my understanding that the Court would or could determine whether an actual ratification vote had taken place since the only witness to the meeting at the TRO application was the Union Business Agent, Mr. Netto. The Court was informed by Defense counsel that drivers attended the meeting and that their testimony would be very important. (See, Transcript, pages 25-26.)

8. On July 26, 2004, had I known the Court intended to hear the merits of the entire lawsuit, I would have objected as discovery had not been conducted and Granite Rock was unprepared to go forward on all issues. For immediate injunctive relief Granite Rock was relying on Mr. Netto's confirmation that the tentative collective bargaining agreement had been ratified or approved by the membership. Granite Rock did not intend to waive the right to establish at a later date that such a ratification vote actually took place should the Court determine that Granite Rock was not informed by a Union Agent of the ratification by the membership on July 2, 2004. (See, Transcript, page 27.)

9. On July 26, 2004, I had no intention of consolidating the application for the temporary restraining order with a trial of the entire First Amended Complaint or the Complaint for Damages.

10. To my knowledge, at no time during the July 26, 2004 hearing, did Granite Rock waive its right to further discovery or to a trial on the merits of the entire lawsuit.

11. On July 26, 2004, during the Court's recitation of its Findings of Fact, I was not aware the Court intended there to be a trial on the merits of the entire lawsuit. I believed the Findings of Fact were with respect to Granite Rock's request for injunctive relief and that Granite Rock could proceed with its lawsuit as set forth in the First Amended Complaint.

12. I first understood that the Court intended to conduct a trial on the merits of the entire lawsuit at the end of the hearing when the Court issued its Judgment dismissing Granite Rock's lawsuit.

13. The hearing of July 26, 2004, lasted approximately two hours.

14. I had no knowledge that the Union would claim that there was no vote whatsoever on July 2, 2004, until the hearing of July 26, 2004.

I declare under penalty of perjury of the laws of the United States and the State of California that the foregoing is true and correct.

Dated: August 9, 2004

/s/

ALAN S. LEVINS
LITTLER MENDELSON
A Professional Corporation
Attorneys for Plaintiff
GRANITE ROCK
COMPANY

[Dated January 24, 2005]

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA
SAN JOSE DIVISION

Granite Rock Company, Plaintiff(s), v. International Brotherhood of Teamsters, Freight, Construction, General Drivers, Warehousemen and Helpers, Local 287 (AFL-CIO), Defendant(s).	NO. C 04-02767 JW ORDER GRANTING PLAINTIFF'S MOTION FOR A NEW TRIAL; VACATING JUDGMENT; SETTING TRIAL, SETTING CONFERENCE

On September 13, 2004, the parties appeared for a hearing on Plaintiff Granite Rock Company's ("Plaintiff") motion for a new trial or in the alternative motion to vacate. The Court continued the hearing on the motion to November 15, 2004 at 9:00 a.m., and granted Plaintiff leave to conduct limited discovery. Based upon all papers filed to date and the comments of counsel at the November 15, 2004 hearing, the Court grants Plaintiff's motion for a new trial for the masons set forth below.

A court may grant a new trial on the basis of new evidence if (1) the evidence was discovered after trial; (2) the party exercised due diligence to discover the evidence before the end of trial; (3) the evidence is material and not merely cumulative or impeaching; and (4) the new evidence would likely have changed the outcome of the case. Fed.R.Civ.P. 59(a); *Far Out Productions. Inc. v. Oskar*, 247 F.3d 986, 998 (9th Cir. 2001). The evidence presented by Plaintiff in support of its motion satisfies each of these requirements. Plaintiff's main witness, Mr. Walrod, stepped forward after the Court rendered its decision on the application for a temporary restraining order. Plaintiff exercised due diligence to discover the evidence before the end of trial. *See* Woolpert Decl. The law requires only due diligence, not unrelenting diligence. Mr. Walrod's proposed testimony is material and not merely cumulative or impeaching. Significantly, Mr. Walrod states the following in his declaration:

> 7. After the questions and discussion, Mr. Netto conducted a secret ballot vote. Mr. Netto distributed pink cards printed with the following words: "Local 287 official ballot," "yes," "no," and "circle one." Mr. Netto gave us pencils and instructed us to circle "yes" or "no" to indicate whether we approved the new contract or not. Mr. Netto personally handed me, and the other people, the pink card on which we should cast our vote.
>
> 8. Mr. Netto then collected the pink cards and reviewed them. Chris Nowak and Brian Driscoll tall[ied] the votes onto a notepad. Mr.

> Netto announced that the vote was unanimous support for the new contract.
>
> 9. After the announcement of the vote, Mr. Netto discussed the Company's separate ideas for Saturday work and strongly suggested that we simply adopt the Company's position because we had been satisfied with the contract as a whole.

Decl. of Richard Ronald Walrod, ¶¶7-9. Moreover, the Court finds that Mr. Walrod's proposed testimony, in combination with the deposition testimony of other union members attending the union meeting[1], would likely have changed the outcome of the case. At the time the Court rendered its decision on the application for a temporary restraining order, the Court only had the benefit of direct testimony from Mr. Netto regarding what transpired in the union meeting. Mr. Walrod's description of what transpired at the union meeting differs significantly from Mr. Netto's description. Furthermore, the other union members' deposition testimony does not necessarily fully substantiate Mr. Netto's description of what transpired. At a minimum, Mr. Walrod's proposed testimony would have influenced the Court to refrain from making a final decision on whether the union contract was ratified.

---

[1] *See* deposition testimony of Brian Driscoll, George Hafely, Steve Nunez, Brian Sheridan, Jesus Galaz, Clyde McIntyre, Tim McReynolds, Edward Alvernaz, Don Hopf, Ryan Vargas, William Zielazowski, and Kenneth Coy.

Accordingly, the motion for a new trial is granted. The judgment is vacated. The Court sets a trial setting conference for February 28, 2005 at 10:00 a.m. The parties shall file a joint trial setting . conference statement no later than February 15, 2005.

Dated: January 24, 2005

/s/

JAMES WARE
United States District
Judge

[Dated, July 19, 2005]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Granite Rock Company, Plaintiff, v. International Brotherhood of Teamsters, Freight, Construction, General Drivers, Warehousemen and Helpers, Local No. 287, Defendant	NO. C 04-02767 JW **ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS, OR, IN THE ALTERNATIVE, FOR A STAY PENDING ARBITRATION**

I. INTRODUCTION

Plaintiff Granite Rock Company ("Plaintiff" or "Granite Rock") brings this action against Defendant International Brotherhood of Teamsters, Freight, Construction, General Drivers, Warehousemen and Helpers, Local No. 287 ("Defendant" or "Local 287") pursuant to Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), for disputes arising out of alleged contract violations. Plaintiff alleges that there was a ratified collective bargaining agreement between the parties, and that Defendant

violated the agreement by engaging in an unlawful strike. Defendant now moves for judgment on the pleadings under Rule 12(c), or, in the alternative, for a stay of proceedings pending arbitration of the dispute.

A hearing on Defendant's motion was set for July 11, 2005. However, this Court finds it appropriate to take the motion under submission without oral argument pursuant to Civil Local Rule 7-1(b). Based on the arguments advanced by counsel in their briefs and on the pleadings, Defendant's motion is DENIED.

II. BACKGROUND

Plaintiff Granite Rock is a California company engaged in the business of supplying ready mixed concrete for commercial use. Defendant Local 287 is a voluntary, unincorporated association, commonly known as and doing business as a "labor organization" within the meaning of 29 U.S.C. § 185. Local 287 represented certain Granite Rock employees at its San Jose facility, and is the collective bargaining representative for employees engaged as drivers at the San Jose facility.

From March 1, 1999 to April 30, 2004 Plaintiff and Defendant were parties to a collective bargaining agreement. (Amended Complaint, hereinafter "Am. Compl.," ¶ 6.) Preliminary negotiations for a new agreement commenced in March 2004. Negotiations continued throughout April and May without success. In early June 2004, after the agreement's expiration, bargaining unit employees at the San Jose facility went out on strike. (Am. Compl. ¶ 8.)

After further negotiations, Plaintiff alleges the parties reached an agreement at 4:00 am on Friday, July 2, 2004 on terms for a new collective bargaining agreement covering the period from May 1, 2004 to April 30, 2008. (Am. Compl. ¶ 8.) In addition, Plaintiff claims that George Netto, Local 287's Business Representative, called to inform Plaintiff that the agreement was ratified later that same day by a vote of all the union employees. (Am. Compl. ¶ 10.) Defendant denies that the agreement was ever ratified.

Plaintiff also alleges that the parties agreed to maintain the same contract language as the previous collective bargaining agreement, except where noted in the July 2, 2005 agreement. (Am. Compl. ¶ 9.) The relevant portions to this action, Plaintiff alleges, are Section 19 ("Discharge / Suspension"), Section 20 ("Grievance Procedure") and Section 22 ("Strikes and Lockouts"). Plaintiff alleges that the parties agreed to discuss a "Back to Work Agreement" at a later date, and that any such agreement would be subject to the grievance procedure set forth in the July 2, 2005 collective bargaining agreement. That agreement included a no-strike clause and a compulsory grievance and arbitration procedure for the settlement of any disputes "arising under" the agreement. (Am. Compl. ¶ 11.)

Plaintiff alleges that Defendant violated the July 2, 2005 collective bargaining agreement by calling union members and instructing them not to return to work. Plaintiff alleges that Defendant wanted "guaranteed amnesty" for its employees and employees at Plaintiff's other facilities in three counties covered by separate collective bargaining

agreements. Plaintiff alleges that Defendant violated the agreement by not participating in the compulsory grievance and arbitration provision set forth in the ratified collective bargaining agreement and by engaging in an unlawful strike. (Am. Compl. ¶¶ 13-14.) Plaintiff also alleges that it is willing to participate in the grievance and arbitration proceedings provided in the collective bargaining agreement. (Am. Compl. ¶ 17.) The strike has now ended. However, Plaintiff still prays for damages from the violation of the alleged collective bargaining agreement.

Local 287 has moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), or, in the alternative, for a stay of these proceedings pending arbitration of the dispute. Local 287 argues that Plaintiff's alleged claim is subject to arbitration rather than judicial resolution. Plaintiff responds that a jury, not an arbitrator, must decide the dispute.

III. STANDARDS

"After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings." FED. R. Civ. P. 12(c). For purposes of a 12(c) motion, the allegations of the non-moving party are accepted as true, while the allegations of the moving party which were denied are assumed false. *See Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1990). Judgment on the pleadings is only proper when the moving party clearly establishes that no material issue of fact remains and that the moving party is entitled to judgment as a matter of law. *Id.*

If satisfied that a proceeding involves an issue referable to arbitration under a written agreement, a court "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3. However, parties can only be required to submit to arbitration if they agreed to so submit. *AT & T Technologies v. Communications Workers of America*, 475 U.S. 643, 648 (1986). Unless the parties clearly provide otherwise, "the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *Id.* at 649. The court, if satisfied of the making of an agreement for arbitration, may "make an order directing the parties to proceed to arbitration." 9 U.S.C. § 4.

IV. DISCUSSION

Section 301 of the Labor Management Relations Act provides for suits by and against labor organizations. *See* 29 U.S.C. § 301(a). The plaintiff, under a § 301 claim, must sufficiently plead that there was a violation of a contract "between an employer and a labor organization representing employees affecting commerce as defined in this chapter." *Id.* Defendant Local 287 admits that it is a "labor organization" within the meaning of § 301. (Answer 2.) In its answer and 12(c) motion, however, Defendant denies the ratification of the July 2, 2005 contract between the parties. In addition, Defendant argues that Plaintiff's complaint is legally deficient on its face because the contract dispute must be decided in arbitration rather than in the courts.

The Court finds that Plaintiff's complaint sufficiently alleges a claim under § 301. Plaintiff

alleges an oral agreement and employee ratification of the collective bargaining agreement, specifying the date the agreement was made, July 2, 2005, and the person who informed Plaintiff of the ratification, Union representative George Netto. Plaintiff has included a copy of the alleged contract as an exhibit to its complaint. Plaintiff has also satisfactorily alleged a violation of the agreement, claiming that Defendant Local 287 prompted employees to go out on strike in violation of the agreement. In this 12(c) motion for judgment on the pleadings, the Court accepts as true the allegations of the Plaintiff Granite Rock, here the non-moving party. *See Hal Roach Studios*, 896 F.2d at 1450. Moreover, at this point in the litigation, there is a clearly a disputed issue of material fact as to whether there was a ratified contract at all. *See id.*

Defendant's argument that the dispute is subject to the grievance and arbitration provisions of the contract, rather than court adjudication, is misplaced at this time. The provisions of the contract would only be binding if there was a contract in the first place; yet, Defendant claims the contract was never ratified. Defendant, of course, is allowed to plead in the alternative under Federal Rule of Civil Procedure 8(e)(2). However, Defendant cannot avail itself of arbitration while at the same time insisting that the agreement was never ratified. Moreover, for the purposes of a 12(c) motion, the Court need not determine the merits of the dispute; here, it is enough that a material issue of fact remains over the existence of the contract. *See Hal Roach Studios*, 896 F.2d at 1550 (judgment on the pleadings is only proper when moving party clearly establishes that

no material issue of fact remains). Thus, Defendant's 12(c) motion for judgment on the pleading is denied.

The Court also denies Defendant's alternative motion for a stay of these proceedings pending arbitration. A stay of a proceeding pending arbitration will only be granted if the court is satisfied that the dispute involves an issue referable to arbitration according to a written agreement. 9 U.S.C. § 3. However, "the existence and scope of a contract to arbitrate are questions for the court to determine in the first instance." *California Trucking Assn v. Teamsters Local 70*, 679 F.2d 1275, 1280 (9th Cir. 1982). Unless the parties agree otherwise, the courts decide whether the parties have agreed to arbitrate specific issues. *Id.* Here, Defendant Local 287 denies the ratification of the July 2, 2005 collective bargaining agreement. Thus, the Court must first decide whether a contract exists before either party can be subject to or ordered to take their dispute to arbitration. The Court cannot determine from the pleadings before it, as a matter of law, whether the contract was ratified. Without a judicial determination of the existence and scope of the alleged collective bargaining agreement, the Court will not stay these proceedings pending arbitration at this time.

V. CONCLUSION

For the foregoing reasons, the Court DENIES Defendant's motion for judgment on the pleadings, or, in the alternative, for an order staying these proceedings pending arbitration.

Dated: July 18, 2005

/s/ James Ware
JAMES WARE
United States District
Judge

[Dated, November 21, 2005].

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

GRANITE ROCK COMPANY,

Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, FREIGHT, CONSTRUCTION, GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL 287 (AFL-CIO),

Defendant

NO. C 0402767 JW

ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S JURY DEMAND

I. INTRODUCTION

Plaintiff Granite Rock Company ("Plaintiff") brings this action against Defendant International Brotherhood of Teamsters, Freight, Construction, General Drivers, Warehousemen and Helpers, Local No. 287 ("Defendant") pursuant to Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), for disputes arising out of alleged contract violations. Plaintiff alleges that there was a ratified

collective bargaining agreement between the parties, and that Defendant violated the agreement by engaging in an unlawful strike.

Defendant now moves for partial summary judgment. The purpose of the motion "is to enable the Court to determine in advance of trial whether, as Defendant contends, particular issues raised by the not heard at trial by the Court." Motion, p.1 Specifically, Defendant contends that "trial of this case must be limited to the single question of whether the collective bargaining agreement that Plaintiff claims to have been violated was in existence at the time the alleged violation occurred, and that the potential issues as to whether Defendant violated the agreement and the amount of damages, if any to be awarded, must be referred to arbitration if the agreement is found by the Court to have been in existence at the relevant time." *Id.* Defendant also moves to strike Plaintiff's jury demand.

A hearing on Defendant's motions was set for November 14, 2005. However, this Court finds it appropriate to take the motions under submission without oral argument pursuant to Civil Local Rule 7-1(b). Based on the arguments advanced by counsel in their briefs and on the pleadings, Defendant's motion for partial summary judgment is GRANTED, and Defendant's motion to strike Plaintiff's jury demand is DENIED.

II. BACKGROUND

A. Factual Background

Plaintiff Granite Rock is a California company engaged in the business of supplying ready mixed concrete for commercial use. Defendant Local 287 is a voluntary, unincorporated association, commonly known as and doing business as a "labor organization" within the meaning of 29 U.S.C. § 185. Defendant represents certain Granite Rock employees at its San Jose facility, and is the collective bargaining representative for employees engaged as drivers at the San Jose facility.

From March 1, 1999 to April 30, 2004 Plaintiff and Defendant were parties to a collective bargaining agreement. (Amended Complaint, hereinafter "Am. Compl.," ¶ 6.) Preliminary negotiations for a new agreement commenced in March 2004. Negotiations continued throughout April and May without success. In early June 2004, after the agreement's expiration, bargaining unit employees at the San Jose facility went on strike. (Am. Compl. ¶ 8.) Plaintiff alleges that after further negotiations, the parties reached an agreement at 4:00 a.m. on Friday, July 2, 2004 on terms for a new collective bargaining agreement covering the period from May 1, 2004 to April 30, 2008 ("New Agreement"). (Am. Compl. ¶ 8.) In addition, Plaintiff claims that George Netto, Defendant's Business Representative, called to inform Plaintiff that the New Agreement was ratified later that same day by a vote of all the union employees. (Am. Compl. ¶ 10.)

Defendant denies that the New Agreement was ever ratified. Instead, Defendant asserts that ratification

was conditioned on the parties first agreeing on a "Back to Work Agreement." Plaintiff, on the other hand, alleges that the parties agreed to discuss a "Back to Work Agreement" at a later date, and that any such "Back to Work Agreement" would be subject to the grievance procedure set forth in the New Agreement. The New Agreement included a no-strike clause and a compulsory grievance and arbitration procedure for the settlement of "any disputes" arising under the agreement. (Am. Compl. ¶ 11.)

On July 5, 2004, Defendant allegedly violated the New Agreement by calling union members and instructing them not to return to work. (Am. Compl. ¶ 13.) Plaintiff alleges that Defendant informed Plaintiff that its members would not return to work until Plaintiff executed a "Back to Work Agreement" guaranteeing amnesty for its employees and for employees of Plaintiff's other facilities in three counties covered under separate collective bargaining agreements with different unions. (Am. Compl. ¶ 13.) Plaintiff also alleges that Defendant violated the New Agreement by not participating in the compulsory grievance and arbitration provision set forth in the agreement and by engaging in an unlawful strike. (Am. Compl. ¶¶ 13-14.) The strike has now ended. However, Plaintiff still seeks damages resulting from the alleged violation of the New Agreement.

B. Procedural Background

On July 9, 2004, Plaintiff filed the instant complaint against Defendant for damages from the allegedly unlawful strike. Shortly thereafter, Plaintiff amended the complaint to include injunctive relief,

and brought a motion for temporary restraining ("TRO") to: (1) Enjoin and restrain Defendant from "[t]hreatening, causing, directing, assisting or participating in any strike, slowdown or other concerted refusal to perform work in violation of the collective bargaining agreement between the parties, or in any other manner interrupting the normal operations of Plaintiff over any dispute, complaint or grievance with Plaintiff concerning the discipline and/or amnesty on striking employees which is resolvable under the grievance and arbitration provisions of the Parties' collective bargaining agreement"; and (2) to "withdraw any outstanding orders or directions to employees of Plaintiff that said employees should engage in a cessation of work because of any dispute over the application or interpretation of the Collective Bargaining Agreement and to advise all employees and prospective employees of Plaintiff represented by Defendant not to engage in any of the acts described above." Plaintiff's Application, p.2.

The Court determined that Plaintiff's application for a temporary restraining order could be consolidated with a trial on the merits pursuant to Rule 65, Fed.R.Civ.P., and proceeded to hear the case on its merits with respect to whether the collective bargaining agreement had been ratified. Following the receipt of testimony, the Court found that the New Agreement had not been ratified; dismissed the complaint; and entered judgment.

Plaintiff next filed a motion for a new trial based upon newly discovered evidence, which the Court granted. Thereafter, Defendant moved for judgment on the pleadings under Federal Rule of Civil

Procedure 12(c), or, in the alternative, for a stay of these proceedings pending arbitration of the dispute. The Court denied Defendant's motion because of the underlying factual dispute regarding the alleged ratification of the New Agreement. *See* Order Denying Defendant's Motion for Judgment on the Pleadings, Docket Item No. 57.

Defendant now moves for partial summary judgment under Federal Rule of Civil Procedure 56 to resolve the scope of the arbitration clause contained in the New Agreement. The arbitration provision in the New Agreement states that "[a]ll disputes arising under this agreement shall be resolved in accordance with the [Federal Mediation and Conciliation Service for Mediation if the Union and the Employer are unable to resolve the dispute]." (Decl. of Duane B. Beeson, Ex. B at 18.) Defendant contends that assuming that the Court finds ratification, the New Agreement requires arbitration of the remaining issues, namely breach and damages. Plaintiff, however, contends that all issues are to be decided in this judicial proceeding, not arbitration.

Defendant also moves to strike Plaintiff's jury demand under Federal Rule of Civil Procedure 39(a), on the grounds that Plaintiff's demand was untimely, or alternatively, that Plaintiff waived its right to jury trial. Plaintiff opposes the motion.

III. STANDARDS

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to

judgment as a matter of law." Fed. R. Civ. P. 56(c). The purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." *Celotex v. Catrett*, 477 U.S. 317, 323-324 (1986).

The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323. If this burden is met, the moving party is then entitled to judgment as a matter of law when the non-moving party fails to make a sufficient showing on an essential element with respect to which the non-moving party bears the burden of proof at trial. *Id.* at 322-23.

The non-moving party "must set forth specific facts showing that there is a genuine issue for trial. " Fed. R. Civ. P. 56(e). The non-moving party cannot defeat the moving party's properly supported motion for summary judgment simply by alleging some factual dispute between the parties. To preclude the entry of summary judgment, the non-moving party must bring forth material facts, i.e., "facts that might affect the outcome of the suit under the governing law . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986).

The court must draw all reasonable inferences in favor of the non-moving party, including questions of credibility and of the weight to be accorded particular evidence. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520 (1991) (citing *Anderson*, 477 U.S. at 255); *Matsushita*, 475 U.S. at 588; *T.W. Elec. Serv. v. Pac. Elec. Contractors*, 809 F.2d 626, 630 (9th Cir. 1987). It is the court's responsibility "to determine whether the 'specific facts' set forth by the nonmoving party, coupled with undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence." *T.W. Elec. Serv.*, 808 F.2d at 631. "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587.

IV. DISCUSSION

Defendant's motion for summary judgment is based upon the arbitration provision of the New Agreement and is relatively straightforward: if the Court finds that the New Agreement was ratified, the remaining issues, namely the alleged breach of the New Agreement and damages, are subject to arbitration pursuant to the terms of the New Agreement. Plaintiff contends, however, that: (1) Defendant has repudiated the arbitration provision by arguing that the New Agreement was not ratified; (2) Defendant is judicially and equitably estopped from asserting

the arbitration provisions; (3) Defendant has waived its right to arbitrate; and (4) bifurcation of ratification issues from contract violation and damages issues is inefficient and inappropriate.

A. Repudiation

Citing to *California Trucking Ass'n. v. Bhd. of Teamsters & Auto Truck Drivers, Local 70*, 679 F.2d 1275 (9th Cir. 1982), Plaintiff contends that Defendant repudiated the arbitration provision in the New Agreement because: (1) Defendant made an untimely assertion of the arbitration claims, and (2) denied the binding effect of the New Agreement. Plaintiff's Opposition, p.3.[1]

What occurred before the court in *California Trucking Ass'n*, however, is materially distinct from what occurred before this Court. In *California Trucking Ass'n*, the union did not assert a right to arbitration in a timely manner. *California Trucking Ass'n* 679 F.2d at 1284. Instead, the union "argued before the court that it preferred to have the action determined in a speedy trial." *Id.* The union also delayed over three years before moving to dismiss

---

[1] In general, "when a contract calls for arbitral resolution of questions arising under the collective bargaining agreement, the equitable defense of repudiation is a matter to be decided in arbitration, not in court." *California Trucking* at 1282. *See also Local Union No. 370 of the Int'l Union of Operating Eng'rs v. Morrison-Knudsen Co., Inc.*, 786 F.2d 1356, 1358 (9th Cir. 1986) ("It is well-settled law that the question of whether repudiation [of a collective bargaining agreement] has occurred must normally be submitted to the arbitrator."). However, a district court has jurisdiction to resolve a repudiation defense based on conduct occurring before it. *California Trucking* at 1283.

the lawsuit for failure to exhaust contractual grievance procedures, and delayed an additional year before requesting a stay. *Id.* Moreover, the court in *California Trucking Ass'n* found that "neither the motions for dismissal nor the motion for stay alleged that the provisions in the . . . agreement it now relies upon required arbitration." Further, the court in *California Trucking Ass'n* found that the union had "substantially invoked the litigation machinery by submitting several motions for summary judgment on the merits." *Id.*

In the instant case, although Defendant opposed Plaintiff's motion for TRO by arguing that there was no ratification of the New Agreement, and that even if there was ratification, there was nothing to arbitrate,[2] Defendant did not engage in the kind of dilatory tactics that the union in *California Trucking Ass'n* did. Defendant has consistently argued that the arbitration provision applies to the issues of breach of contract and damages. Defendant's answer specifically asserts the affirmative defense that the alleged breach of contract and damages are issues subject to the grievance and arbitration provisions of the collective bargaining agreement. (Defendant's Answer, Docket Item No. 43 at 3:14-20.) At the TRO hearing, Defendant argued that there was nothing to arbitrate, and not, as Plaintiff contends, that the arbitration provision does not apply. Further, in each of Defendant's substantive motions to date, Defendant has asked the Court to find that the arbitration provision applies to the issues of breach

---

[2] Non-performance of an alleged union contract, even when unjustified, is not *per se* a repudiation of the arbitration provision contained therein. *California Trucking Ass'n*, 679 F.2d at 1283.

of contract and damages. Therefore, the Court finds that Defendant has not repudiated the arbitration provision contained in the New Agreement.

B. Judicial and Equitable Estoppel

Citing to *New Hampshire v. Maine*, 532 U.S. 742 (2001), Plaintiff contends that Defendant is judicially and equitably estopped from asserting the arbitration provision of the New Agreement. In *New Hampshire*, the Supreme Court identified several factors that typically inform the decision whether to apply the doctrine of judicial estoppel in a particular case: (1) whether the party's later position is "clearly inconsistent" with its earlier position; (2) whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Id.* at 750-751.

Plaintiff contends that the Court should apply the doctrine of judicial estoppel because: (1) Defendant denied the binding effect of the New Agreement; (2) Defendant succeeded at the temporary restraining order stage in arguing that the New Agreement had not been ratified; and (3) Defendant derives an unfair advantage by being able to effectively choose what forum it would prefer to have adjudicate the liability and damages of its violation of the New Agreement's no-strike clause.

Plaintiff's argument is unpersuasive for a number of reasons. First, the law allows Defendant to assert both that the union contract does not exists, and alternatively that if it does exist, the arbitration provision applies. *California Trucking Ass'n, v. Bhd. of Teamsters & Auto Truck Drivers. Local 70, supra*, at 1283-1284. Furthermore, as discussed previously in Section "A" to this Order, Defendant has consistently argued that the arbitration provision applies to the issues of breach of contract and damages.

As for Plaintiff's contention of forum shopping, this judicial forum was selected by Plaintiff, not Defendant. Therefore, the Court rejects Plaintiff's judicial and equitable estoppel theories.

C. Waiver

Plaintiff contends that Defendant waived its right to arbitrate because of undue delay in bringing the matter to arbitration, and that Plaintiff was prejudiced from the delay. As the Court has explained in Section "A" of this Order, Defendant did not unduly delay making its arbitration. The Court granted Plaintiff's Motion for a New Trial on January 25, 2005, and Defendant immediately filed an answer on February 17, 2005, asserting the compulsory arbitration provision as an affirmative defense. Defendant's Answer to Amended Complaint, Docket Item No. 43. Because there was no undue delay, the Court need not reach the prejudice issue.

D. Efficiency and Appropriateness

Plaintiff contends that a bifurcation of ratification issues from contract violation and damages issues is

inefficient and inappropriate. Plaintiff's contention is unpersuasive. In *Drake Bakeries. Inc. v. Local 50, Am. Bakery*, 370 U.S. 254 (1962), the Supreme Court found that under our federal labor policy, courts have "every reason to preserve the stabilizing influence of the collective bargaining contract" where the arbitration provision includes all disputes, did not exclude claims for strikes, and contemplated submission of grievances. *See Id.* at 258. The arbitration provision in the instant case includes all disputes. Plaintiff does not contend that the arbitration provision excludes claims for strikes, and the submission of grievances to an arbitrator was clearly contemplated in the agreement. Therefore, assuming ratification, the Court has every reason to preserve the stabilizing influence of the New Agreement, and refer the appropriate issues to arbitration.

E. Jury Demand

Defendant contends that Plaintiff's jury demand was untimely. Under Federal Rule of Civil Procedure 38(b), "any party may demand a trial by jury of any issue triable of right by a jury by . . . serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue." Fed. R. Civ. P. 38(b). The last pleading directed to the issue of a jury trial was Defendant's Answer to Amended Complaint, Docket Item No. 43. *See Pacific Fisheries Corp. v. HIH Cas. & Gen. Ins.. Ltd.*, 239 F.3d 1000, 1002. In *Pacific Fisheries Corp.*, the jury demand was untimely because the jury demand was filed more than ten days after the defendant had

answered the complaint. *Id.* In our case, Defendant's Answer to Amended Complaint was filed on February 17, 2005, and Plaintiff made a demand for a jury trial on February 24, 2005. Therefore, Plaintiff's jury trial demand was timely.

Nevertheless, relying upon *White v. McGuiness*, 903 F.2d 699 (9th Cir. 1990), Defendant contends that Plaintiff waived its right to a jury trial on the ratification issue. The *White v. McGuiness* case, however, is factually distinct from the instant case. In holding that the plaintiff had knowingly waived his right to a jury trial, the *White* court found that the objecting party was on notice that the trial court was planning to adjudicate the dispositive issues of fact, *and* chose to argue his case *fully* before the district judge. In the instant case, Plaintiff did not choose to argue its case fully before the Court. What Plaintiff chose to argue before the Court without a jury was whether a temporary restraining order should issue against Defendant for violating the Labor Management Relation Act, and *not*, as Defendant contends, the issue of whether the collective bargaining agreement had been ratified. Moreover, the Court has an obligation to indulge every reasonable presumption against the waiver of the jury right. *See Pradier v. Elespuru*, 641 F.2d 808, 811 (9th Cir. 1981).

V. CONCLUSION

For the reasons set forth above, Defendant's motion for partial summary judgment is GRANTED, and Defendant's motion to strike is DENIED.

Dated: November 18, 2005

/s/
JAMES WARE
United States
District Judge

Supreme Court, U.S.
FILED
AUG 27 2009
[illegible]E CLERK

(11)

No. 08-1214

In The Supreme Court of The United States

GRANITE ROCK COMPANY,
Petitioner,

v.

THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS & TEAMSTERS LOCAL 287,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX
VOLUME 2 OF 2

GARRY G. MATHIASON
Counsel of Record
ALAN S. LEVINS
ADAM J. PETERS
RACHELLE L. WILLS
LITTLER MENDELSON
650 California Street, 20th Floor
San Francisco, CA 94108
Telephone: 415.433.1940

ARTHUR R. MILLER
Of Counsel
NEW YORK UNIVERSITY
SCHOOL OF LAW
40 Washington Square South
Vanderbilt Hall 409D
New York, NY 10012
Telephone: 212.992.8147
Counsel for Petitioner

DUANE B. BEESON
Counsel of Record
BEESON, TAYER & BODINE
1404 Franklin St., 5th Fl.
Oakland, CA 94612
Telephone: 510.625.9700
Counsel for Teamsters Local 287

PETER DAVID NUSSBAUM
Counsel of Record
ALTSHULER BERZON LLP
177 Post St., Suite 300
San Francisco, CA 94108
Telephone: 415.421.7151
Counsel for International Brotherhood of Teamsters, et al.

Petition for Writ of Certiorari Filed March 30, 2009
Certiorari Granted June 29 2009

doc 14
HASTOC 5Ø7ARW

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

Ø' e 004

TABLE OF CONTENTS

Court of Appeals

Certified Transcript Of Audio-Taped Proceedings Before The Ninth Circuit Court Of Appeals In The Matter Of Teamsters Union Local 287, et. al. v. Granite Rock.....*JA-1 to JA-42.*

The Opinion Of The United States Court of Appeals For The Ninth Circuit, Granite Rock Co. v. Int'l Brotherhood Of Teamsters, Local 287, 546 F.3d 1169 (9th Cir. 2008) [Docket No. 385].....*JA-43 to JA-61.*

U.S. District Court

Complaint For Damages
[Docket No. 1].....*JA-62 to JA-69.*

First Amended Complaint For Injunctive Relief And Damages [Docket No. 5]..... *JA-70 to A-79.*

Transcript Of The July 26, 2004 TRO Hearing [Docket No. 21].....*JA-80 to JA-211.*

Judgment [Docket No. 12].....*JA-212 to JA-213.*

Plaintiff's Motion For A New Trial (Omitting Points And Authorities In Support Thereof
[Docket No. 16]..... *JA-214 to JA-216.*

Declaration Of Alan S. Levins In Support Of Plaintiff's Motion For A New Trial.
[Docket No. 19].....*JA-217 to JA-221.*

Order Granting New Trial
[Docket No. 41].....*JA-222 to JA-225.*

Order Denying Defendant's Motion For Judgment On The Pleadings, Or, In The Alternative, For A Stay Pending Arbitration
[Docket No. 57].....*JA-226 to JA-233.*

Order Granting Defendant's Motion For Partial Summary Judgment And Denying Defendant's Motion To Strike Plaintiff's Jury Demand [Docket No. 83].....*JA-234 to JA-248.*

Second Amended Complaint For Damages And Injunctive Relief
[Docket No. 110].....*JA-249 to JA-258.*

Transcript Of Hearing On Motion To Dismiss Second Amended Complaint
[Docket No. 177].....*JA-259 to JA-300.*

Order Granting Motion To Dismiss With Leave To Amend [Docket No. 162].....*JA-301 to JA-303.*

Third Amended Complaint For Damages
[Docket No. 164].....*JA-304 to JA-321.*

Order Granting Defendant International Brotherhood Of Teamsters' Motion To Dismiss With Prejudice [Docket No. 192].....*JA-322 to JA-333.*

Interlocutory Judgment
[Docket No. 194].....*JA-334.*

Order Certifying Appeal Pursuant To Rule 54(b) [Docket No. 212].....*JA-335 to JA-340.*

Amended Final Judgment And Certification Of Appealability [Docket No. 225].....*JA-341 to JA-342.*

Order Denying Labor Union's Motion To Compel Arbitration Of Bifurcated Issue Of Whether The Collective Bargaining Agreement Was Ratified [Docket No. 230].....*JA-343 to JA-362.*

Closing Instructions With Stipulated Facts [Docket No. 304] As Exhibit 1
[Docket No. 318].....*JA-363 to JA-377.*

Jury Verdict [Docket No. 321].....*JA-378 to JA-380.*

Order to Compel Arbitration
[Docket No. 323].....*JA-381 to JA-382.*

Additional Materials

Union Proposal for "Back To Work Agreement" (Fax Dated 07/03/04) [Trial Exhibit].....*JA-383 to JA-384.*

Finalized, Executed Collective Bargaining Agreement Between Granite Rock Company And Teamsters Local 287 (Effective 05/01/04 to 04/30/08) [Trial Exhibit].....*JA-385 to JA-396.*

Tentative Agreement Between Granite Rock Company And Teamsters Local 287
[Trial Exhibit].....*JA-397 to JA-448.*

[Dated February 17, 2006]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

GRANITE ROCK COMPANY, Plaintiff, v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, FREIGHT, CONSTRUCTION, GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 287; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Defendants.	Case No. C 04 2767 JW SECOND AMENDED COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF

COMES NOW, the Plaintiff and complains against the Defendant as follows:

JURISDICTION

1. This is a suit for damages and injunctive relief pursuant to Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a). This Court has jurisdiction under Section 301 and under 28 U.S.C. § 1337.

PARTIES

2. Plaintiff Granite Rock Company ("Plaintiff") is, and at all times material hereto was, a California corporation engaged in the business of supplying ready mixed concrete for commercial use with its principal office at 350 Technology Drive, Watsonville, California 95077. In the past twelve months, Granite Rock has purchased more than $50,000 worth of goods and supplies directly from points located outside the State of California. *Id.* Thus, Granite Rock is an "employer" as that term is defined in the Labor Management Relations Act of 1947, as amended.

3. Defendant International Brotherhood of Teamsters, Freight, Construction, General Drivers, Warehousemen and Helpers, Local No. 287 (hereinafter "Defendant Local 287") is, and all times material hereto was, a voluntary, unincorporated association, commonly known as and doing business as a labor organization within the meaning of 29 U.S.C. § 185. At all times material hereto, Defendant Local 287 acted as a labor organization which represented certain Granite Rock Company employees at its San Jose facility referred to as the "Berryessa Plant." Defendant Local 287 is the collective bargaining representative for employees engaged as drivers at the Berryessa Plant. Defendant Local 287 maintains an office and place of business at 1452 No. 4th St., San Jose California 95112.

4. Defendant International Brotherhood of Teamsters (hereinafter "Defendant IBT") is, and at all times material hereto was, a voluntary, unincorporated association, commonly known as and

doing business as a labor organization within the meaning of 29 U.S.C. § 185. At all times material hereto, Defendant Local 287 was a local union chartered by Defendant BT. Plaintiff is informed and believes that, at all times material hereto, an agency relationship existed between Defendant IBT and Defendant Local 287. Rome Aloise, a union official who played a key leadership role in the events that are the basis for this lawsuit, is, and during all material times hereto was, an agent of Defendant IBT.

5. Plaintiff Granite Rock Company is, and at all times material hereto was, an employer in an industry affecting commerce as defined in 29 U.S.C. § 142(1) and (3) and 29 U.S.C. § 152.5(5), and within the meaning of 29 U.S.C. § 185.

6. Under section 301(a) of the Labor Management Relations Act (29 U.S.C. § 185(a)), United States district courts have original jurisdiction of actions arising out of violations of contracts between labor organizations, regardless of citizenship and amount.

CLAIMS FOR RELIEF (AGAINST ALL DEFENDANTS)

7. From the period of March 1, 1999, to April 30, 2004, Plaintiff and Defendant Local 287 were parties to a collective bargaining agreement which sets forth the terms and conditions of employment for bargaining unit employees. (See Exhibit A to the declaration of Bruce Woolpert, "Woolpert Decl.").

8. In March 2004, Plaintiff and Defendant Local 287 commenced preliminary negotiations on a new

agreement. Thereafter, the parties continued negotiations over the course of the next three months. On April 30, 2004, Plaintiff submitted a "Final Offer" to Defendant Local 287 for review. A "Revised Final Offer" was submitted on or about May 21, 2004. Defendant Local 287 rejected Plaintiff's offers. Subsequently, the parties continued negotiating for a successor agreement. One of the most significant issues in the negotiations was Plaintiff's total economic package proposal including wages and benefits.

9. In early June 2004, after the expiration of the former collective bargaining agreement, the bargaining unit employees at the San Jose facility went out on strike. Subsequently, the parties met again to negotiate regarding the outstanding issues with the key issue being the total economic package. On the evening of Thursday, July 1, 2004, Plaintiff and Defendant Local 287 met for negotiations. At approximately 4:00 a.m. on Friday, July 2, 2004, the parties reached agreement on terms for a new four-year collective bargaining agreement covering the term of May 1, 2004 through April 30, 2008. At the conclusion of the session, George Netto, Business Representative, Teamsters Local 287, stated that the contract would be presented to the Union members for ratification at 9:00 a.m. that same day (Friday, July 2, 2004). He also stated that the pickets would be removed.

10. The parties agreed to maintain the same contract language as the previous agreement except as noted in Plaintiff's July 2, 2004 "Final Offer." (See July 2, 2004 "Final Offer," Exhibit B, "Woolpert Decl."). The grievance and arbitration provisions set

forth in Section 20 of the prior collective bargaining agreement remain the same in the new Agreement with one exception not relevant to this matter. At the conclusion of the session, the parties discussed preparing a Back to Work Agreement at a later date. During subsequent conversations regarding the Back to Work Agreement, the parties agreed that any such agreement would be subject to the grievance procedure.

11. On or about 9:00 a.m. on Friday, July 2, 2004, a ratification meeting was held with the Granite Rock Company bargaining unit employees. At the meeting, the agreement was presented orally to the Local 287 members and a ratification vote was held. Plaintiff is informed and believes that the employees voted on the contract and approved it. That same day, several employees contacted Plaintiff regarding returning to work. Later that day, Mr. Netto contacted Plaintiff and stated the Agreement was ratified.

12. The portions of the Agreement which are material to this Complaint are Section 19 ("Discharge/Suspension"), Section 20 ("Grievance Procedure") and Section 22 ("Strikes and Lockouts"). Section 19 provides a just cause standard for discharge and suspension of bargaining unit employees. Section 20 provides a compulsory grievance and arbitration procedure for the settlement of any disputes between Plaintiff and Defendant arising from the application of any provisions of the Agreement or affecting the relation of the employees and the Employer. Unresolved grievances may be submitted to an Arbitrator specifically selected by the parties. The decision of

the Arbitrator is final and binding on the parties. Section 22 of the Agreement concerns the circumstances in which employees may lawfully strike under the Agreement.

13. It is well settled that in exchange for a compulsory grievance and binding arbitration procedure, a union signatory to such a collective bargaining agreement is obligated not to strike over a dispute arising out of the application or interpretation of the Agreement.

14. On Monday, July 5, 2004, in repudiation of the collective bargaining agreement and in violation of its provisions, Defendant Local 287 called union members at their homes and instructed, authorized, instigated, and encouraged them not to return to work. The next day (Tuesday, July 6, 2004), Defendant Local 287 informed Plaintiff that its members would not return to work until Plaintiff executed a Back to Work Agreement guaranteeing amnesty for its employees and for employees at Plaintiff's other facilities in three counties covered under separate collective bargaining agreements with different unions. Thus requiring Plaintiff to drop its previously issued grievances against the respective unions for violation of the no-strike provisions of their individual labor contracts as a condition of reaching agreement. Local 287 members engaged in an unlawful strike in clear violation the Agreement until September 13, 2004. Additionally, Plaintiff's employees covered under separate collective bargaining agreements with different unions refused to cross the Teamsters' picket line at Plaintiff's other facilities.

15. Defendant Local 287 refused to abide by the terms and conditions of the collective bargaining agreement between it and Plaintiff. The agreement includes a valid no-strike clause that precludes a continuation of the current dispute. Plaintiff has duly performed all conditions of the agreement on its part to be performed such as calling people to work shifts consistent with the agreement. By its actions and conduct alleged herein, Defendant has breached the Agreement between Plaintiff and Defendant, and, in particular, the compulsory grievance and arbitration provisions and Defendant's no-strike obligation inherent in the Agreement.

16. As a result of the actions of Defendant Local 287, its officers, agents, and employees, Plaintiff has been deprived of the benefits of said collective bargaining agreement it negotiated with Defendant Local 287. Without said collective bargaining agreement, Plaintiff is deprived, inter alia, of the benefits of the no-strike protections contained in the contract as well as the labor peace and stability attendant to a collective bargaining agreement.

17. By reason of the aforesaid breach of the Agreement, Plaintiff has been unfairly and improperly prevented from conducting its normal business activities of supplying ready mix concrete for its commercial customers. Plaintiff has suffered and will continue to suffer great and irreparable damage by reason of Defendant's actions in that Plaintiff will not be able to conduct its normal business activities.

18. Defendant IBT is jointly and severally liable for all damage caused by the unlawful strike because

Defendant IBT and Defendant Local 287 were in an agency relationship at all times hereto in which the IBT exerted actual control over Local 287. Defendant IBT and its agent, Rome Aloise, ratified and encouraged the unlawful strike. Defendant IBT also directly participated in the unlawful strike by providing strike benefits.

19. Throughout the unlawful strike, Rome Aloise, the Administrative Assistant to the General President of Defendant IBT, played a key leadership role that was a direct cause of the unlawful strike. Mr. Aloise encouraged Plaintiff's employees to remain on strike, giving speeches before groups of employees and sending correspondence supporting the unlawful strike to employees and to representatives of local unions. Mr. Aloise attended bargaining and strategy meetings for other local unions. Mr. Aloise presented negotiations strategies to Mr. Woolpert on behalf of all local unions. He also made representations to Plaintiff's Director of Human Resources, Shirley Ow, that he had the authority of Defendant IBT to settle the unlawful strike. Mr. Aloise received orders directly from Defendant IBT and had a business card stating his position with Defendant IBT. Mr. Aloise was an actual agent of Defendant IBT.

20. Throughout the unlawful strike, Plaintiff's employees who were members of local Teamsters unions received out-of-work benefits from Defendant IBT as long as they did not return to work. Mr. Aloise played a key role in requesting these benefits on behalf of these employees. In granting the out-of-work benefits, Defendant IBT ratified the unlawful strike as being of benefit both to it and Defendant

Local 287. By providing these benefits, Defendant IBT also allowed the strike to continue for a protracted period of time and encouraged employees to remain on strike to receive the benefits. Defendant IBT only provided the benefits to employees who remained on strike for a certain number of days. Defendant IBT also monitored the unlawful strike of Plaintiff's facilities and engaged in communication with Mr. Aloise and Defendant Local 287 regarding the unlawful strike.

21. During all times material hereto, Defendant IBT financially supported Defendant Local 287. In 2001, Defendant IBT provided a loan of $1.2 million dollars to Defendant Local 287 that was in effect throughout 2004. Plaintiff is informed and believes that Defendant IBT was extensively involved in and exerted control over Defendant Local 287's financial affairs. Defendant IBT required Defendant Local 287 to submit monthly reports regarding its financial affairs and to undergo financial audits. Defendant IBT also had authority to determine how and when Defendant Local 287 could spend money. Defendant IBT required Defendant Local 287 to comply with numerous conditions to obtain and keep the loan. Defendant IBT financially supported Defendant Local 287 and, in doing so, exerted actual control over Defendant Local 287.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays as follows:

1. For damages according to proof;

2. That the officers, agents, representatives, employees and members, and all other persons

acting at the direction of, or in concert with, said Defendants, be permanently enjoined and restrained from engaging in any of the following activities during the lesser of (1) the pendency of this action or (2) the life of the Agreement:

> engaging in any strike, slowdown or other concerted refusal to perform work in violation of the parties' collective bargaining agreement concerning any dispute, complaint or grievance with Plaintiff regarding the discipline and/or amnesty of striking employees;

3. That Plaintiff be allowed its costs of suit and attorneys' fees herein incurred; and

4. For such other and further relief as the Court may deem proper and just.

Dated: February 17, 2006

/s/

ALAN S. LEVINS
LITTLER MENDELSON
A Professional Corporation
Attorneys for Plaintiff
GRANITE ROCK COMPANY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA
SAN JOSE DIVISION

GRANITE ROCK,	C-04-2767-JW
PLAINTIFF,	MAY 22, 2006
V.	MOTION
LOCAL UNION NUMBER 287,	PAGES 1-40
DEFENDANT.	

THE PROCEEDINGS WERE HELD BEFORE
THE HONORABLE UNITED STATES DISTRICT
JUDGE JAMES WARE

APPEARANCES:

FOR THE PLAINTIFF: LITTLER MENDELSON
BY: ALAN S. LEVINS
650 CALIFORNIA
STREET, 20TH FLOOR
SAN FRANCISCO,
CALIFORNIA 94108

FOR THE DEFENDANT: ALTSHULER, BERZON,
NUSSBAUM,
RUBIN & DEMAIN
BY: PETER NUSSBAUM
PEDER J.
THOREEN

REBEKAH B.
EVENSON
SUITE 300
177 POST STREET
SAN FRANCISCO,
CALIFORNIA 94108

OFFICIAL COURT REPORTER: IRENE
RODRIGUEZ, CSR, CRR
CERTIFICATE NUMBER 8074

SAN JOSE, CALIFORNIA MAY 22, 2006

PROCEEDINGS

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT:)

THE CLERK: NEXT MATTER CIVIL-04-2767, GRANITE ROCK VERSUS LOCAL UNION 287. DEFENDANT'S MOTION TO DISMISS.
COUNSEL, COME FORWARD AND STATE YOUR APPEARANCES FOR THE RECORD.

[2] MR. LEVINS: ALAN LEVINS OF LITTLER MENDELSON FOR THE PLAINTIFF AND RESPONDENT IN THIS CASE GRANITE ROCK.

[2] MR. NUSSBAUM: GOOD MORNING. PETER NUSSBAUM AND WITH ME IS REBECCA EVENSON AND PEDER THOREEN REPRESENTING THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS.

[2] MR. BEESON: GOOD MORNING. DUANE BEESON REPRESENTING LOCAL 287 THE ORIGINAL DEFENDANT.

[2] THE COURT: VERY WELL. THIS IS THE INTERNATIONAL BROTHERHOOD'S MOTION TO DISMISS.

[2] MR. NUSSBAUM: WHAT I WOULD LIKE TO DO, YOUR HONOR, FIRST IS TO GIVE YOU A BRIEF OVERVIEW WITH REGARD TO OUR MOTION AND THEN GO INTO MORE DETAIL WITH REGARD TO THE SPECIFIC PARTS OF THE MOTION AND WITH REGARDS TO THE SPECIFIC MOTIONS THAT WE HAVE RAISED.

[3] OUR MOTION RAISED TWO ISSUES TO THE COURT. THE FIRST OF THOSE IS AS TO WHETHER OR NOT THE SECOND AMENDED COMPLAINT PROPERLY STATES A. CAUSE OF ACTION AGAINST THE INTERNATIONAL PURSUANT TO SECTION 301 OF THE NATIONAL LABOR RELATIONS ACT.

[3] THE SECOND ISSUE IS IF IT DOES NOT, SHOULD PLAINTIFF GRANITE ROCK BE GIVEN AN OPPORTUNITY AT THIS LATE DATE TO FILE A THIRD AMENDED COMPLAINT IN WHICH IT ATTEMPTS TO COME UP WITH SOME NEW THEORY OF LIABILITY AGAINST THE INTERNATIONAL.

[3] AND LET ME BRIEFLY SUMMARIZE THE INTERNATIONAL'S POSITION WITH REGARD TO THOSE ISSUES.
[3] FIRST SECTION 301 GIVES THIS COURT LIMITED JURISDICTION. IT GIVES IT JURISDICTION FOR QUOTE, "VIOLATION OF

CONTRACTS," CLOSED QUOTE, BETWEEN UNIONS AND EMPLOYERS.

[3] THE SECOND AMENDED COMPLAINT ATTEMPTED TO STATE A BREACH OF CONTRACT CLAIM AGAINST THE INTERNATIONAL BUT FAILS TO DO SO BECAUSE THE SECOND AMENDED COMPLAINT DOES NOT ALLEGE THE INTERNATIONAL IS A PARTY TO GRANITE ROCK EITHER DIRECTLY OR BASED ON AGENCY PRINCIPLES, AND, THEREFORE, THE INTERNATIONAL CANNOT BE LIABLE FOR DAMAGES PURSUANT TO SECTION 301.

[4] THE SECOND AMENDED COMPLAINT DOES NOT ALLEGE ANY CLAIM. BASED ON TORT THEORY, AND MOREOVER, EVEN IF IT DID, IT WOULD NOT STATE A CLAIM UNDER SECTION 301, WHICH AS I NOTED A MOMENT AGO, GIVES THIS COURT JURISDICTION ONLY OVER SUITS FOR VIOLATIONS OF CONTRACTS, AND IN OTHER WORDS, FOR BREACH OF CONTRACT SUITS.

[4] FINALLY IT'S OUR POSITION THAT THE PLAINTIFF SHOULD NOT BE ALLOWED TO FILE YET ANOTHER AMENDED COMPLAINT. IT HAD AMPLE OPPORTUNITY TO CONDUCT EXTENSIVE DISCOVERY REGARDING THE INVOLVEMENT, THE ALLEGED INVOLVEMENT OF THE INTERNATIONAL.

[4] PLAINTIFF SET FORTH ITS BEST ARGUMENT OF WHY THE INTERNATIONAL CAN BE LIABLE FOR BREACH OF CONTRACT,

BUT THAT THEORY FAILS AS A MATTER OF LAW.

[4] PLAINTIFF SHOULDN'T BE ALLOWED TO, TO PLEAD ANY TORT THEORIES BECAUSE THOSE TORT THEORIES CANNOT STATE A CLAIM UNDER SECTION 301, AND THUS ANY AMENDMENT WOULD BE FUTILE AND SHOULDN'T BE ALLOWED.

[4] LET ME NOW GO INTO EACH ONE OF THOSE IN A LITTLE MORE DETAIL. WITH THE COURT IF I MAY.

[5] AS WE INDICATED IN OUR OPENING BRIEF AND IN OUR REPLY BRIEF, BOTH THE LANGUAGE AND THE LEGISLATIVE HISTORY OF SECTION 301 MAKE IT CLEAR THAT IT WAS DESIGNED TO, TO ENSURE THAT UNIONS COULD BE SUED FOR BREACHING CONTRACTS TO WHICH THEY ARE PARTIES.

[5] AND OF COURSE IT'S AN ELEMENTARY PRINCIPLE OF CONTRACT LAW AND UNDER SECTION 301 THAT ONLY A PARTY CAN BE LIABLE FOR DAMAGES IN A BREACH OF CONTRACT ACTION.

[5] THE IM WORKERS CASE IS ONE OF THE MANY CIRCUIT AND CIRCUIT CASES THAT WE CITED FOR THAT PROPOSITION.

[5] IT'S UNCONTESTED IN THIS CASE THAT THE CONTRACT ON ITS FACE IS NOT BETWEEN GRANITE ROCK AND THE

INTERNATIONAL. IT'S BETWEEN GRANITE ROCK AND LOCAL 287.

[5] IT'S ALSO UNCONTESTED AND THERE'S NO CLAIM MADE TO THE CONTRARY THAT NO OFFICIAL OF THE INTERNATIONAL EXECUTED THE COLLECTIVE BARGAINING AGREEMENT BETWEEN GRANITE ROCK AND LOCAL 287.

[5] AND IN EFFECT, ALL OF PLAINTIFF'S COMPLAINTS, INCLUDING THE SECOND AMENDED COMPLAINT, HAVE ALLEGED THAT THE CONTRACT IS BETWEEN GRANITE ROCK AND LOCAL 287.

[6] NOW, I WOULD CALL THE COURT'S ATTENTION SPECIFICALLY TO PARAGRAPH 15 OF THE SECOND AMENDED COMPLAINT WHICH MAKES THAT CLEAR.

[6] GRANITE ROCK NOW ATTEMPTS TO CLAIM THAT THE INTERNATIONAL IS SOMEHOW A PARTY TO, TO THE GRANITE ROCK LOCAL 287 CONTRACT ON AGENCY PRINCIPLES.

[6] TO FIND THAT THE INTERNATIONAL IS LIABLE ON AN AGENCY THEORY AND GRANITE ROCK AGREES WITH THIS, IT HAS TO BE SHOWN, PLED, THAT LOCAL 287, THAT THE INTERNATIONAL LOCAL 287, WITH EITHER ACTUAL OR APPARENT AUTHORITY TO ENTER INTO A COLLECTIVE BARGAINING AGREEMENT ON BEHALF OF THE INTERNATIONAL. THERE'S NO SUCH CLAIM IN THE SECOND AMENDED COMPLAINT.

INSTEAD GRANITE ROCK NOW MAKES THREE REMARKS RELATING TO AGENCY.

[6] THE FIRST OF THOSE ARGUMENTS DEALS WITH ACTIONS BY MR. ALOISE AND GRANITE ROCK CLAIMS THAT MR. ALOISE WHO WAS THE HEAD OF ANOTHER LOCAL, NOT OF LOCAL 287, WHO HAS SOME PART-TIME POSITION WITH THE INTERNATIONAL, THAT SOMEHOW HIS ACTIONS CREATED AN AGENCY RELATIONSHIP.

[6] BUT IN THEIR OPPOSITION TO OUR MOTION, GRANITE ROCK HAS MISREPRESENTED WHAT THE SECOND AMENDED COMPLAINT ACTUALLY ALLEGES ABOUT MR. ALOISE.

[7] IN FACT, THE ALLEGATIONS ABOUT MR. ALOISE, WHICH IN THE CHARGING ALLEGATIONS IN PARAGRAPH 19 HAVE NOTHING TO DO WITH THE CRITICAL ISSUE BEFORE THE COURT WITH WHETHER HE WAS SOMEHOW INVOLVED IN THE FORMATION OF THE COLLECTIVE BARGAINING AGREEMENT AND IN SUCH A MANNER AS TO MAKE THE INTERNATIONAL A PARTY. THAT'S THE KEY ISSUE BEFORE THE COURT.

[7] IN FACT, IF MR. ALOISE HAD REALLY BEEN INVOLVED IN THE FORMATION OF THAT CONTRACT, GRANITE ROCK WOULD HAVE BEEN AWARE OF THAT. AFTER ALL, THEY WERE THE ONES, GRANITE ROCK'S PRINCIPALS WERE INVOLVED IN NEGOTIATING THE CONTRACT. THEY KNEW

WHO THEY WERE NEGOTIATING THE CONTRACT, BUT THE SECOND AMENDED COMPLAINT PROPERLY MAKES NO ALLEGATION THAT MR. ALOISE WAS INVOLVED IN NEGOTIATING THE CONTRACT BECAUSE HE WASN'T INVOLVED IN NEGOTIATING THE CONTRACT.

[7] INSTEAD WHAT PARAGRAPH 19 ALLEGES ARE CERTAIN ACTIONS BY MR. ALOISE DURING THE STRIKE, IN OTHER WORDS, AFTER THE COLLECTIVE BARGAINING AGREEMENT WAS ENTERED INTO.

[7] THOSE ALLEGATIONS, HOWEVER, ARE IRRELEVANT TO THE CRUCIAL ISSUE BEFORE THE COURT OF CONTRACT FORMATION BECAUSE ONLY IF THE INTERNATIONAL WAS. INVOLVED IN CONTRACT FORMATION CAN THERE BE AN ARGUMENT THAT IT SOMEHOW IS A PARTY TO THE COLLECTIVE BARGAINING AGREEMENT.

[8] HAVING SOMEHOW BEEN INVOLVED WITH THE BREACH HAS NOTHING TO DO WITH THE ISSUE OF WHETHER IT'S BOUND TO THE CONTRACT OR WHETHER IT WAS A PARTY TO THE CONTRACT. THAT'S THE STEP THAT HAS BEEN MISSING IN THEIR ANALYSIS.

[8] THE SECOND THEORY THAT THEY'RE PUTTING FORTH ON AGENCY IS THE CLAIM NOW THAT LOCAL 287 SOMEHOW WAS QUOTE, "AN AGENT" FOR ALL PURPOSES.

[8] THAT ALSO IS NOT ALLEGED IN THE SECOND AMENDED COMPLAINT, AND, IN FACT, IT'S FAIRLY ABSURD ON ITS FACE BECAUSE THAT MEANS THAT LOCAL 287 HAD AUTHORITY TO DO EVERYTHING AND ANYTHING FOR THE INTERNATIONAL.

[8] AND, IN FACT, IN ARGUING BEFORE YOU, BEFORE WE WERE INVOLVED IN THE CASE, THE MOTION FOR LEAVE TO AMEND, GRANITE ROCK CONTENDED THAT THE INTERNATIONAL WAS THE AGENT, NOW, OF COURSE, THEY CHANGED THEIR ARGUMENT AND ARE CLAIMING SOMEHOW NOW THAT WE ARE THE PRINCIPAL.

[8] IN SUPPORT OF THEIR ARGUMENT REGARDING THE AGENT FOR ALL PURPOSES THEORY, PLAINTIFF CITES TWO THINGS THAT IT ALLEGES IN THE COMPLAINT. FIRST THAT THE INTERNATIONAL SUPPORTED LOCAL 287 FINANCIALLY THROUGH A LOAN THAT WAS MADE SEVERAL YEARS BEFORE ALL OF THIS OCCURRED.

[9] AND SECONDLY, BECAUSE THE INTERNATIONAL PROVIDED –

[9] THE COURT: THAT PART IS NOT ALLEGED?

[9] MR. NUSSBAUM: YES, YES, IT'S -- THERE ARE ALLEGATIONS. THERE'S NOT AN ALLEGATION ABOUT AGENT FOR ALL PURPOSES BUT THERE IS MENTION IN THE COMPLAINT AS I RECALL ABOUT FINANCIAL

SUPPORT THROUGH A LOAN AND SECOND TO STRIKE BENEFITS.

[9] THE COURT: BUT THERE'S NO ALLEGATION, THE TRUTH OF WHICH I CAN TAKE FOR THIS MOTION THAT THE LOAN WAS MADE PRIOR TO ALL OF THE EVENTS GIVING RISE TO THE CLAIM. THE ALLEGATION IS THAT THERE IS FINANCIAL SUPPORT, PERIOD.

[9] MR. NUSSBAUM: COULD I JUST CHECK FOR ONE SECOND?

[9] THE COURT: CERTAINLY. THERE'S NO REFERENCE TO THE TIMING OF THE FINANCIAL SUPPORT.

[9] MR. LEVINS: I KNOW IT'S BEEN MENTIONED IN A NUMBER OF PLACES.

[9] THE COURT: IN THE COMPLAINT IT SIMPLY SAYS DEFENDANT IBT FINANCIALLY SUPPORTED DEFENDANT LOCAL 287 AND IN DOING SO IT EXERTED ACTUAL CONTROL.

[10] MR. NUSSBAUM: I THINK IN OTHER PAPERS WHICH HAVE BEEN FILED.

[10] THE COURT: NO, YOU'RE RIGHT.

[10] MR. NUSSBAUM: RIGHT. PARAGRAPH 21.

[10] THE COURT: WAS A LOAN.

[10] MR. NUSSBAUM: AND IT INDICATES THAT THE LOAN WAS MADE IN 2001, WHICH IS

APPROXIMATELY THREE YEARS BEFORE THE EVENTS THAT ARE BEFORE THE COURT.

[10] THE COURT: I SUPPOSE IF I RELATE THOSE TWO THEN I WOULD, I WOULD TAKE YOUR ARGUMENT THAT FOR PURPOSES OF THIS, THE FINANCIAL SUPPORT IS THIS PREDATED -- THANK YOU.

[10] MR. NUSSBAUM: THAT IS WHAT THEY ALLEGE.

[10] BUT THE CASES THAT WE CITED TO YOU IN OUR OPPOSITION, THE BARE FOOT CASE AND THE GIBBS CASE SHOW THAT THOSE ALLEGATIONS, EVEN IF TRUE, DO NOT CREATE AN AGENCY RELATIONSHIP IN GENERAL AND CERTAINLY DO NOT CREATE AN AGENCY RELATIONSHIP GIVING LOCAL 287 THE POWER TO BIND THE INTERNATIONAL TO A COLLECTIVE BARGAINING AGREEMENT.

[10] AND I WOULD JUST REMIND THE COURT, WE HAVE FILED AND ASK FOR JUDICIAL NOTICE OF THE INTERNATIONAL'S CONSTITUTION WHICH SPECIFICALLY SAYS THAT THE INTERNATIONAL CANNOT BE BOUND TO A CONTRACT, A COLLECTIVE BARGAINING AGREEMENT, WITHOUT WRITTEN AUTHORIZATION AND THERE IS NO CLAIM THAT THERE WAS SUCH AUTHORIZATION IN THIS CASE BECAUSE, IN FACT, THERE WAS NO AUTHORIZATION IN THIS CASE.

[11] THE THIRD ARGUMENT THAT IS MADE BY GRANITE ROCK WITH REGARD TO AGENCY, ALSO A NEW ARGUMENT, IS THAT, IS THAT THE INTERNATIONAL WAS A QUOTE, "UNDISCLOSED PRINCIPAL," CLOSED QUOTE, RELYING ON CARBON FUEL AND SEATTLE TIMES INTERESTINGLY BOTH OF THOSE CASES THE UNION WAS ACTUALLY A SIGNATORY TO THE COLLECTIVE BARGAINING AGREEMENT AND IT MAKES THE ISSUES DIFFERENT AND IT DOESN'T RAISE THE ISSUES BEFORE THE COURT.

[11] THAT THEORY WOULD MEAN THAT WHAT THEY ALLEGED IN THE SECOND AMENDED COMPLAINT LOCAL 287 IS NOW A PARTY TO THE CONTRACT AND BECAUSE IN AN UNDISCLOSED SITUATION, IT'S THE PRINCIPAL THAT IS BOUND NOT THE AGENT, HOWEVER, THAT SUGGESTION BY THEM IS DIRECTLY CONTRARY TO THE COLLECTIVE BARGAINING AGREEMENT ITSELF WHICH CLEARLY STATES THE CONTRACT IS BETWEEN GRANITE ROCK AND LOCAL 287 AND IT'S ALSO COMPLETELY CONTRARY TO EVERYTHING THEY ALLEGED IN ALL OF THE COMPLAINTS THEY FILED WHICH IS THAT THE CONTRACT IS BETWEEN GRANITE ROCK AND LOCAL 287 AND AGAIN I WOULD REFER YOU SPECIFICALLY TO PARAGRAPH 15 OF THE SECOND AMENDED COMPLAINT WHERE THAT IS MADE CLEAR.

[12] THE UNDISCLOSED PRINCIPAL THOUGH WOULD ALSO MEAN THAT ONLY THE INTERNATIONAL IS A PARTY TO A

COLLECTIVE BARGAINING AGREEMENT WITH GRANITE ROCK AND THAT SUGGESTION IS ALSO PREPOSTEROUS.

[12] AS THE SECOND AMENDED COMPLAINT ALLEGES PRIOR CONTRACTS HAVE ALWAYS BEEN BETWEEN LOCAL 287 AND GRANITE ROCK, AND MOREOVER, AS A MATTER OF LAW, THE INTERNATIONAL COULD NOT BE A PARTY TO THE COLLECTIVE BARGAINING AGREEMENT WITH GRANITE ROCK BECAUSE UNDER THE NATIONAL LABOR RELATIONS ACT AN EMPLOYER CAN ONLY ENTER INTO A COLLECTIVE BARGAINING AGREEMENT WITH THE EXCLUSIVE REPRESENTATIVE OF ITS EMPLOYEES.

[12] THAT IS A REPRESENTATIVE THAT HAS BEEN, HAS BEEN EITHER APPROVED THROUGH A BOARD ELECTION, AN NLRB ELECTION PURSUANT TO SECTION 9(A) OF THE LABOR RELATIONS ACT, OR THROUGH, OR THROUGH, THROUGH A CARD CHECK.

[12] THERE IS NO CLAIM, NO CLAIM THAT THE INTERNATIONAL IS THE, IS THE EXCLUSIVE REPRESENTATIVE, AND, IN FACT, WE HAVE ALSO ASKED THE COURT TO TAKE JUDICIAL NOTICE OF THE UNFAIR LABOR PRACTICE CHARGE THAT WAS FILED BY GRANITE ROCK BASED ON WHICH THE NLRB ISSUED A COMPLAINT AGAINST LOCAL 287 AND ALL OF THAT CLAIMS THAT LOCAL 287 IS THE EXCLUSIVE REPRESENTATIVE.

[13] THE INTERNATIONAL IS NOT, AND THEREFORE, THE INTERNATIONAL COULD NOT ENTER INTO A CONTRACT WITH GRANITE ROCK. SUCH A CONTRACT WOULD BE UNFAIR LABOR PRACTICE BOTH FOR THE INTERNATIONAL AND FOR GRANITE ROCK AND THE CONTRACT WOULD BE NULL AND VOID AND BECAUSE THEY'RE NOT THE EXCLUSIVE REPRESENTATIVE.

[13] AND SOME -- ALL OF THIS SHOWS THAT THEIR ARGUMENT THAT THEY'RE MAKING ABOUT AN UNDISCLOSED PRINCIPAL IS JUST GRASPING ON THEIR PART TO COME UP WITH SOME THEORY BEFORE THE COURT.

[13] GRANITE ROCK ALSO ARGUES THAT THE INTERNATIONAL COULD BE LIABLE FOR DAMAGES EVEN IF IT IS NOT A PARTY TO THE COLLECTIVE BARGAINING AGREEMENT. THEY RELY ON TWO CASES FOR THAT PRIMARY PURPOSE AND THOSE CASES ARE READILY DISTINGUISHABLE. THE FIRST CASE IS CALLED ABREEN. A-B-R-E-E-N. AND PLAINTIFF CLAIMS THAT BASED ON THAT CASE THAT THERE CAN BE LIABILITY ON THE PART OF THE INTERNATIONAL IF QUOTE, "INDEPENDENTLY PARTICIPATED IN THE BREACH," CLOSED QUOTE.

[14] BUT ABREEN WAS A TOTALLY DIFFERENT CASE. ABREEN WAS BROUGHT UNDER SECTION 303 OF THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. SECTION 187, WHICH SPECIFICALLY MAKES ANY UNION, A LOCAL, OR AN INTERNATIONAL, LIABLE FOR

SECONDARY BOYCOTT DAMAGES IF THE UNION PARTICIPATES IN THE ILLEGAL SECONDARY ACTIVITY.

[14] AND IN OTHER WORDS, UNDER SECTION 303, UNLIKE SECTION 301, THERE DOESN'T HAVE TO BE A CONTRACT FOR THERE TO BE LIABILITY.

[14] THE ABREEN CASE HAS NOTHING TO DO WITH WHETHER, WHETHER THE UNION, IN THIS PARTICULAR CASE THE INTERNATIONAL, CAN BE LIABLE FOR A BREACH OF CONTRACT UNDER SECTION 301 WHEN IT IS NOT A PARTY TO AN ACTION AND WHEN BEING A PARTY TO AN ACTION IS AN ELEMENT FOR DAMAGES UNDER SECTION 301 FOR BREACH OF CONTRACT.

[14] THE SECOND CASE THAT IS RELIED UPON BY GRANITE ROCK FOR THEIR CLAIM THAT YOU CAN HAVE DAMAGES EVEN IF YOU'RE NOT A PARTY IS THE PAINTING AND DECORATING CONTRACTOR'S CASE AND PLAINTIFF CLAIMS THAT STANDS FOR THE PROPOSITION THAT A NONPARTY CAN BE LIABLE FOR DAMAGES.

[15] IN FACT, THAT CASE SIMPLY HELD THAT A NONPARTY, WHICH IT WAS CREATED BY THE CONTRACT ITSELF TO ADMINISTER ITS TERMS CAN BE A DEFENDANT FOR INJUNCTIVE PURPOSES TO ENSURE COMPLETE RELIEF.

[15] IN THAT CASE YOU HAD A UNION AND EMPLOYER ENTERING INTO AN AGREEMENT AND THERE WAS A COLLECTIVE BARGAINING AGREEMENT BETWEEN THEM, AND THEN, AND THEN THOSE PARTIES THROUGH THE CONTRACT CREATED A JOINT COMMITTEE TO, TO ADMINISTER THE CONTRACT. AND IT DID CERTAIN THINGS AND THERE WAS A CLAIM THAT CERTAIN THINGS THAT WERE BEING DONE WERE IMPROPER AND A SUIT WAS BROUGHT AND THE COURT FOUND THAT YOU COULD GET INJUNCTIVE RELIEF AGAINST THAT JOINT LABOR COMMITTEE BECAUSE IT WAS CREATED BY THE JURY TO ADMINISTER ITS TERMS AND WITHOUT INJUNCTIVE RELIEF YOU COULDN'T GET COMPLETE REMEDIAL RELIEF BUT THE CASE DOES NOT STAND FOR THE PROPOSITION THAT A NONPARTY CAN BE LIABLE FOR DAMAGES IN A SECTION 301 CASE.

[15] AND UNDER NONE OF THE THEORIES THAT, THAT GRANITE ROCK HAS PUT FORTH CAN, CAN THE INTERNATIONAL BE LIABLE, LIABLE FOR BREACH OF CONTRACT BECAUSE, BECAUSE IT IS NOT A PARTY TO THE COLLECTIVE BARGAINING AGREEMENT AND IT CAN'T BE LIABLE FOR DAMAGES IF IT'S NOT A PARTY; THEREFORE, PLAINTIFF HAS NOT STATED A CLAIM UNDER SECTION 301 FOR BREACH OF CONTRACT AND AMENDING THE COMPLAINT AS THEY SUGGEST THEY SHOULD BE ALLOWED TO DO WOULD BE FUTILE BECAUSE PLAINTIFF KNOWS WHAT OCCURRED BASED ON ITS PEOPLE BEING PRESENT DURING NEGOTIATIONS, BASED ON

THE DISCOVERY IT CONDUCTED OF THE INTERNATIONAL OF MS. ALOISE AND OF MR. NEDTO WHO WAS FROM LOCAL 287. PLAINTIFF ALLEGED WHAT OCCURRED, WHAT IT KNEW OCCURRED AND THOSE ALLEGATIONS COULD NOT STATE A CLAIM FOR RELIEF AGAINST THE INTERNATIONAL.

[16] THE COURT: YOUR TIME IS OVER BUT LET ME ASK, YOU MENTION MR. ALOISE IS A PART-TIME ASSOCIATE FOR OR AN EMPLOYEE OF THE INTERNATIONAL.

[16] WHAT IS HIS POSITION?

[16] MR. NUSSBAUM: HE'S A SPECIAL, THE TITLE HE'S GIVEN IS A SPECIAL ASSISTANT TO THE PRESIDENT.

[16] WHAT HE DOES IS THAT HE CAN BE CALLED ON FROM TIME TO TIME TO COME IN AND, AND DO THINGS FOR THE INTERNATIONAL IN VARIOUS SITUATIONS. THAT'S NOT WHAT OCCURRED IN THIS PARTICULAR SITUATION. THERE'S NO ALLEGATION TO THAT EFFECT.

[16] HE WAS THE HEAD OF ONE OF THE OTHER LOCALS THAT HAD A CONTRACT WITH GRANITE ROCK THAT BECAME INVOLVED IN THE LABOR DISPUTE AFTER THE STRIKE BEGAN BECAUSE THEIR CONTRACTS ALLOWED THOSE OTHER LOCALS, AFTER A CERTAIN PERIOD OF TIME TO, TO RESPECT THE PICKET LINE OF LOCAL 287. SO THAT WAS THE ONLY INVOLVEMENT. HE WAS IN THERE

REPRESENTING THE LOCAL THAT HE REPRESENTS WHICH I THINK IS 583, I BELIEVE, IS THE LOCAL NUMBER.

[17] THE COURT: VERY WELL.

[17] MR. NUSSBAUM: WE ALSO HAD BRIEFED, JUST TWO SECONDS THE TORT THEORIES THAT WERE RAISED AND A COUPLE OF POINTS I WANTED TO MAKE ON THEM.

[17] ONE, THEY'RE CLEARLY NOT PLED IN THE SECOND AMENDED COMPLAINT. THAT COMPLAINT WAS CLEARLY FOR BREACH OF CONTRACT, AND THE LAW IS CLEAR UNDER 301, AND WE CITED YOU, THE NINTH CIRCUIT HAS SPOKEN PARTICULARLY ON IT BUT COURT CASES FROM THIS CIRCUIT AND COURT CASES FROM OTHER CIRCUITS, YOU CANNOT HAVE A TORTIOUS INTERFERENCE CLAIM UNDER SECTION 301 AND YOU CAN'T HAVE A CLAIM FOR INTERFERENCE WITH RESPECT TO CONTRACTUAL RELATIONS.

[17] THE NINTH CIRCUIT, AS I SAID, HASN'T SPOKEN ON IT BUT THE MAJORITY RULE IS YOU CAN'T DO IT AND TWO OTHER DISTRICT COURTS IN THIS CIRCUIT AND IN VERY DETAILED AND THOROUGH OPINIONS HAVE ADOPTED THAT RULE AND EXPLAINED WHY THAT SHOULD BE THE LAW. SO FOR THAT REASON, FOR THAT REASON THE TORT CLAIMS, WHICH AREN'T PLED, EVEN IF THEY WERE PLED, WOULD NOT STATE A CLAIM FOR RELIEF. AND THAT'S AN ADDITIONAL REASON WHY THERE SHOULD NOT BE LEAVE TO

AMEND THE COMPLAINT BECAUSE, BECAUSE ALL OF THE CONTRACT THEORIES THEY HAVE PUT FORWARD BEFORE YOU, WHICH WE BRIEFED, NONE OF THEM MAKE THE INTERNATIONAL A PARTY.

[18] THE TORT THEORIES CANNOT BE PUT FORWARD BECAUSE THEY DO NOT STATE A CLAIM UNDER 301, THEREFORE, TO ALLOW GRANITE ROCK AT THIS TIME TO AMEND WOULD BE A FUTILE ACT AND WOULD JUST REQUIRE THE INTERNATIONAL TO HAVE TO GO THROUGH ANOTHER ROUND OF FILING A MOTION AND THERE WOULD BE FURTHER DELAY FOR THE COURT WITH THE OTHER PARTIES WHO ARE IN THE CASE AND FURTHER EXPENSE OF THE INTERNATIONAL WHICH IS NOT WARRANTED AND THE COURT HAS DISCRETION TO, TO, TO RULE THAT THEY NOT BE ALLOWED TO GET, TO GET A THIRD AMENDED COMPLAINT PARTICULARLY AT THIS LATE DATE AND WE CITED THE NINTH CIRCUIT CASES WHICH INDICATE THAT YOU HAVE THAT DISCRETION.

[18] THE COURT: THANK YOU, COUNSEL.

[18] MR. NUSSBAUM: THANK YOU.

[18] THE COURT: I STARTED OUT THIS MORNING THINKING I WOULD HOLD THE INTERNATIONAL IN. THIS ARGUMENT HAS, HAS PERSUADED ME THAT THERE MAYBE FOR PURPOSES OF, OF MY LIMITED JURISDICTION A REAL PROBLEM UNDER 301.

[19] WHAT IS YOUR RESPONSE TO THAT?

[19] MR. LEVINS: WELL, NOT AT ALL, YOUR HONOR. THERE'S NO PROBLEM AT ALL. FIRST OF ALL THIS IS A 12(B)(6) MOTION AND THE PLEADINGS HAVE TO BE LIBERALLY CONSTRUED AND EVEN IF THEY DON'T STATE EXACTLY WHAT THE COURT WOULD RECOMMEND IN TERMS OF A CAUSE OF ACTION, WE SHOULD BE GIVEN AN OPPORTUNITY TO AMEND THE COMPLAINT.

[19] AS THE COURT KNOWS, I DON'T HAVE TO GO THROUGH THE HISTORY OF THIS CASE. THERE WAS A VERY, VERY LENGTHY STAY ON DISCOVERY VIRTUALLY ALL DISCOVERY UNTIL JUST THIS LAST SEPTEMBER AND AS OF LAST SEPTEMBER, WE BEGAN DOING DISCOVERY AND FOUND OUT THESE FACTS ABOUT THE INTERNATIONAL.

[19] THE COURT: WHAT DID YOU FIND? WHAT HAVE YOU ALLEGED THAT YOU FOUND?

[19] MR. LEVINS: WE HAVE FOUND THE SIGNIFICANT ROLE OF THE ASSISTANT OF THE GENERAL PRESIDENT HAS PLAYED IN THESE NEGOTIATIONS BOTH AT THE TIME OF THE NEGOTIATIONS, BEFORE THE NEGOTIATIONS, AND AFTER THE NEGOTIATIONS.

[20] THE COURT: AND WHAT -- TELL ME IN YOUR, AS BEST YOU CAN, WHAT THE ASSISTANT DID.

[20] MR. LEVINS: WELL, WE NEED MORE DISCOVERY, BUT WHAT THE FACTS DEMONSTRATE TO US AT THIS POINT IS, IS THAT THE ASSISTANT WAS THE, WAS THE AGENT WHO WORKED WITH LOCAL 287 AND THAT THE INTERNATIONAL WAS THE, WAS THE UNDISCLOSED PRINCIPAL, AND THE PURPOSE OF THE, OF THE AGENCY, WAS, WAS TO GET GRANITE ROCK TO, TO, TO AGREE TO, TO INDEMNIFY NOT ONLY LOCAL 287 BUT ALL OF THE OTHER LOCAL TEAMSTERS THAT WERE INVOLVED IN THIS WORKER DISPUTES INCLUDING 890, 912, AND 853.

[20] AND THERE WAS A NEED TO COORDINATE THIS FROM THE TOP, A NEED TO COORDINATE THIS FROM THE INTERNATIONAL LEVEL AND AN INTERNATIONAL LEVEL AUTHORIZED, AUTHORIZED 287 BY WAY OF, OF ROME ALOISE OR OTHERWISE TO ENGAGE IN THESE NEGOTIATIONS AND TO TRY AND GET, GET THIS INDEMNITY AGREEMENT.

[20] WE HAVE BEEN THWARTED IN OUR DISCOVERY VIRTUALLY FROM DAY ONE. WE HAVE ASKED FOR EXPENSE REPORTS. WE HAVE NOT RECEIVED EXPENSE REPORTS ON THE GROUNDS THAT QUOTE, THE EXPENSE REPORTS –

[20] THE COURT: LET'S STICK WITH -- I'M TRYING TO GET TO THE ALLEGATION THAT WOULD BRING THE INTERNATIONAL INTO THIS LITIGATION FOR BREACH OF THE COLLECTIVE BARGAINING AGREEMENT.

[21] MR. LEVINS: RIGHT. I'M SORRY.

[21] THE COURT: AND AS I UNDERSTAND YOUR ALLEGATION, ARE YOU, ARE YOU ALLEGING THAT, THAT THE 287/GRANITE ROCK CONTRACT WAS INDEED A CONTRACT BETWEEN GRANITE ROCK, 287, AND THE INTERNATIONAL?

[21] MR. LEVINS: THE WAY THE AGENCY SITUATION PLAYS OUT, YOUR HONOR, IN THIS FEDERAL LAW IS THAT THE, THE 287 WAS THE AGENT OF THE INTERNATIONAL AND AN UNDISCLOSED PRINCIPAL IN THIS CASE, THEREFORE, CONTRARY TO WHAT OPPOSING COUNSEL SAID, BOTH THE, THE LOCAL 287 AND THE INTERNATIONAL ARE, ARE RESPONSIBLE FOR THE BREACH OF THIS CONTRACT.

[21] THE COURT: WELL, YOU KNOW, FIRST YOU HAVE TO BE THE PARTY. I ASKED THE QUESTION, AND I'LL ASK IT AGAIN, IS THE ALLEGATION THAT THIS WAS A CONTRACT BETWEEN GRANITE ROCK, 287, AND THE INTERNATIONAL UNION?

[21] MR. LEVINS: YES, BECAUSE OF THE, OF THE INTERNATIONAL'S AGENCY PRINCIPAL STATUS.

[21] THE COURT: SO, IN OTHER WORDS, IN OTHER WORDS, YOUR ALLEGATION IS THAT IN DOING THE THINGS THAT WENT INTO THE CONTRACT, 287 WAS ACTING ON BEHALF OF THE INTERNATIONAL?

[21] MR. LEVINS: YES.

[22] THE COURT: DID THE, DID THE -- THIS WAS A PROBLEM BECAUSE, BECAUSE HAVING TO DO WITH, WITH RATIFICATION AS I UNDERSTOOD IT.

[22] IS YOUR ALLEGATION THAT THE INTERNATIONAL RATIFIED THE CONTRACT?

[22] MR. LEVINS: WELL, IN -- WELL, DID IT RATIFY THE CONTRACT?

[22] LOCAL 287 RATIFIED THE CONTRACT ON BEHALF OF THE INTERNATIONAL.

[22] THE COURT: SO THAT YOUR ALLEGATION IS THAT, IS THAT THE INTERNATIONAL AUTHORIZED 287 TO ENTER INTO THE CONTRACT AND, AND TO, AND TO RATIFY THE CONTRACT ON BEHALF OF THE INTERNATIONAL.

[22] MR. LEVINS: THAT'S CORRECT, IN ORDER -
[
22] THE COURT: NOW, I DON'T NEED TO REMIND YOU OF THE OBLIGATIONS OF RULE 11. YOU'RE A SEASONED LITIGATOR. IF I GIVE YOU PERMISSION TO BRING THAT INTO THE LAWSUIT AND IT TURNS OUT YOU'RE NOT MAKING THOSE ALLEGATIONS IN GOOD FAITH, I WON'T HESITATE TO SANCTION YOU AS COUNSEL FOR PUTTING ME IN THE POSITION OF ALLOWING AN AMENDMENT ON

WHICH YOU HAVE NO LEGAL BASIS FOR MAKING THOSE ALLEGATIONS.

[22] NOW, I SELDOM BRING THAT, ESPECIALLY TO SOMEONE OF YOUR BACKGROUND TO THE ATTENTION, BUT I WANT TO HIGHLIGHT IT NOW BECAUSE, BECAUSE YOU'RE NOW TELLING ME THINGS THAT ARE PERSUADING ME TO ALLOW YOU TO AMEND THE COMPLAINT AND IF YOU DO AMEND TO BRING THOSE IN, AND IT TURNS OUT NOT TO BE WRONG AND YOU, AND YOU HAVE NO BASIS FOR IT. I WON'T HESITATE TO SANCTION YOU.

[23] MR. LEVINS: I UNDERSTAND. THERE IS LEGAL BASIS FOR IT.

[23] THE FACTUAL BASIS WE ARE CONSTANTLY TRYING TO ESTABLISH.

[23] THE COURT: NO, NO. COUNSEL, YOU'RE-- THIS IS VERY IMPORTANT BECAUSE I ASKED YOU A FACTUAL QUESTION.

[23] AND IF YOU SAY I DONT KNOW, THAT HAS DIFFERENT CONSEQUENCES, BUT IF YOU SAY THAT THEY WERE AUTHORIZED TO ACT ON BEHALF OF THE INTERNATIONAL, BOTH IN TERMS OF ENTERING A CONTRACT ON BEHALF THE INTERNATIONAL, SO THE REAL PARTY IN CONTRACT IS GRANITE ROCK AND THE INTERNATIONAL AND THEN NOT ONLY DID THEY AUTHORIZE THEM TO ENTER INTO IT, THIS IS A CONTRACT WHICH THE PARTIES NEGOTIATED ORALLY AND IT HAD TO BE

RATIFIED BY THE RANK AND FILE MEMBERSHIP.

[23] AND IF YOUR OTHER STATEMENT TO ME IS THAT THE INTERNATIONAL AUTHORIZED THE RANK AND FILE MEMBERSHIP OF 287 TO ACT ON BEHALF OF THE INTERNATIONAL IN RATIFYING THE CONTRACT, AND SO INDEED THE, THE LOCAL, LOCAL RANK AND FILE WERE, WERE THEN ACTING ON BEHALF OF THE INTERNATIONAL RATIFYING THE CONTRACT, THAT DOES, THAT DOES PUT YOU IN A POSITION WHERE YOU WERE SAYING THIS IS A CONTRACT BETWEEN GRANITE ROCK AND THE INTERNATIONAL AND IT CHANGES THE POSTURE OF THE CASE.

[24] IF YOU'RE NOT TELLING ME THAT, TELL ME QUICKLY THAT YOU'RE NOT MAKING THAT REPRESENTATION TO THE COURT.

[24] MR. LEVINS: YOUR HONOR, BASED ON THE FACTS THAT I KNOW AT THIS POINT AND THAT WE HAVE SET FORTH IN THE COMPLAINT AND IN THE MOTIONS, THAT, THAT IS WHAT OCCURRED.

[24] THE INTERNATIONAL AUTHORIZED 287 TO, TO ENTER INTO THIS AGREEMENT, AUTHORIZED 287 TO FIGHT FOR THIS SO-CALLED INDEMNITY AGREEMENT.

[24] THE COURT: WELL, WAIT. THAT'S THE -- THE INDEMNITY AGREEMENT IS SOMETHING SEPARATE FROM THE COLLECTIVE BARGAINING AGREEMENT?

[24] MR. LEVINS: YES.

[24] THE COURT: IS IT A VIOLATION OF THE INDEMNITY AGREEMENT THAT YOU'RE SEEKING IN THIS LAWSUIT?

[25] MR. LEVINS: THE INDEMNITY AGREEMENT WAS CALLED A BACK-TO-WORK AGREEMENT IN THIS CASE BEFORE. AND WHAT THE INTERNATIONAL WANTED OUR ALLEGATION, OUR THEORY IS THAT WHAT THE INTERNATIONAL WANTED WAS THAT INDEMNITY AGREEMENT TO BE SIGNED BY GRANITE ROCK AND THEY WERE GOING TO PUT PRESSURE ON GRANITE ROCK UNTIL THAT INDEMNITY AGREEMENT WAS SIGNED BECAUSE THEY HAD FOUR LOCALS OUT THERE WHO THEY WANTED INDEMNITY FOR AND INCLUDING 287 THAT THEY ALSO HAD, HAD LOANED TO A SUBSTANTIAL LOAN TO AND WERE VERY CONCERNED ABOUT THE VIABILITY OF THAT LOAN.

[25] THE COURT: DO WE HAVE THOSE FACTS YET?

[25] MR. LEVINS: NOT ALL OF THEM, YOUR HONOR. WE HAVE THE FACTS WE PUT IN THE COMPLAINT THAT MR. ALOISE ASSERTED HIMSELF INTO THESE NEGOTIATIONS VIRTUALLY FROM DAY ONE.

[25] THE COURT: WOULDN'T YOU BE BETTER OFF, COUNSEL, AND ACTUALLY ON SAFER GROUND ALLOWING ME TO DISMISS THIS

COMPLAINT WITH GRANTING YOU PERMISSION TO CONDUCT DISCOVERY AGAINST A NONPARTY SO THAT YOU COULD SATISFY YOURSELF BEFORE YOU MAKE YOUR AMENDMENT THAT YOU HAVE A FACTUAL BASIS FOR THOSE ALLEGATIONS AND THEN, AND THEN, AND ONLY THEN SEEKING TO, TO INCLUDE THE INTERNATIONAL IN THIS LAWSUIT?

[26] BECAUSE WHAT YOU'RE DOING IS THAT YOU'RE PUTTING, YOU'RE PUTTING A NONPARTY TO THE CURRENT CONTRACT. FROM THE PAST ALLEGATIONS THE INTERNATIONAL DOESN'T SHOW UP AT ALL IN THE ALLEGATIONS YOU HAVE MADE IN THIS COURT BEFORE AND THEY'RE NOT ONLY THERE, BUT THEY'RE THE UNDISCLOSED PRINCIPAL.

[26] BUT AS I HEAR YOU, YOU PUT A NOTE OF CAUTION IN IT BY SAYING I DON'T KNOW THESE THINGS TO BE TRUE, I'M JUST WILLING TO ALLEGE IT.

[26] WOULDN'T YOU BE BETTER OFF ALLOWING, ASKING ME TO ALLOW YOU TO DO DISCOVERY SO YOU CAN SAY NOW I HAVE A FACTUAL BASIS?

[26] MR. LEVINS: WELL, YOUR HONOR, THAT'S WHAT WE HAVE BEEN TRYING TO DO AND I HAVE TRIED TO TELL YOU HOW WE'VE BEEN THWARTED BY BOTH THE INTERNATIONAL AND WHEN WE HAVE ASKED FOR RELEVANT DOCUMENTS.

[26] THE COURT: WHAT RELEVANT DOCUMENTS?

[26] MR. LEVINS: AMONG OTHERS WE WOULD LIKE TO GET THE EXPENSE ACCOUNT OF MR. ALOISE TO SHOW WHETHER HE WAS BEING PAID BY THE INTERNATIONAL IN ORDER TO ENGAGE IN THE CONDUCT THAT HE ENGAGED IN.

[26] WE HAVE ASKED FOR COMMUNICATIONS BETWEEN MR. ALOISE AND THE INTERNATIONAL. WE HAVE ASKED FOR COMMUNICATIONS FROM THE INTERNATIONAL AFTER WE, AFTER WE DEPOSED MR. BELL THAT WE NEVER RECEIVED.

[27] THE COURT: MR. ALOISE THEN, THEN IS THE PERSON YOU HAVE IDENTIFIED AS THE REPRESENTATIVE OF THE INTERNATIONAL WHO, WHO WOULD HAVE AUTHORIZED 287 TO ACT ON ITS BEHALF?

[27] MR. LEVINS: AS FAR AS WE KNOW AT THIS TIME, YES, YOUR HONOR.

[27] THE COURT: AND HE, AS I UNDERSTAND IT, IS A SPECIAL ASSISTANT TO THE PRESIDENT OF THE INTERNATIONAL?

[27] MR. LEVINS: YES. I THINK THE KEY IS THAT THIS IS A 12(B)(6) MOTION, YOUR HONOR. AND IF THE COMPLAINT CAN ALLEGE

A CAUSE OF ACTION, IT SHOULD NOT BE DISMISSED AND EVEN –

[27] THE COURT: WELL, YOU KNOW, IT'S THE OTHER WAY AROUND. IF IT CAN, IT DOESN'T AND IT SHOULD BE DISMISSED.

[27] MR. LEVINS: BUT EVEN THE INTERNATIONAL ACKNOWLEDGES THAT WHERE THE INTERNATIONAL IS SHOWN TO BE AN AGENT AS A LEGAL MATTER, THEY'RE RESPONSIBLE FOR THE BREACH.

[27] THE COURT: WELL, I THOUGHT YOU SAID THEY WERE A PRINCIPAL, NOT AN AGENT?

[28] MR. LEVINS: IF THERE'S AN AGENCY STATUS.

[28] THE COURT: I KNOW, BUT AGENCY STATUS DOESN'T TELL ME WHO THE PRINCIPAL AND THE AGENT IS.

[28] THE COURT: AT ONE POINT YOU TOLD ME THEY WERE AN UNDISCLOSED PRINCIPAL?

[28] MR. LEVINS: NO, YOUR HONOR, I MISSPOKE. WHAT I'M REFERRING TO IS THE AGENCY STATUS. THE CASES ARE CLEAR THAT, THAT WHERE THERE'S AN AGENCY STATUS AND IN THIS CASE THE INTERNATIONAL BEING THE PRINCIPAL AND 287 BEING THE AGENT, THEN, THEN THE PRINCIPAL, THE UNDISCLOSED PRINCIPAL WOULD BE BOUND TO THE COLLECTIVE BARGAINING AGREEMENT.

[28] THE COURT: SO I SHOULD DISMISS 287?

[28] MR. LEVINS: NO, ON AN UNDISCLOSED PRINCIPAL, THEY'RE BOTH RESPONSIBLE FOR THE COLLECTIVE BARGAINING AGREEMENT.

[28] THE COURT: WELL, HOW IS THE AGENT LIABLE UNDER A CONTRACT NEGOTIATED ON BEHALF OF THE PRINCIPAL?

[28] MR. LEVINS: AS A, AS A MATTER OF AGENCY LAW, THAT'S MY UNDERSTANDING. THEY WOULD STILL BE LIABLE FOR THIS, FOR THIS AS A PARTY TO THE CONTRACT.

[28] THE COURT: SO THE AGENT AS WELL AS THE -- WELL, I, I -- AGAIN, I CAUTION YOU BECAUSE IT SEEMS TO ME THAT YOU'RE IN YOUR ZEAL TO GET THE INTERNATIONAL INTO THIS CASE, AND I CAN UNDERSTAND IT, YOU'RE INVITING ME TO, TO, TO PUT, ALLOW YOU TO PUT YOURSELF IN A POSITION WHICH MIGHT JEOPARDIZE YOUR CLAIMS AGAINST, AGAINST 287. BECAUSE IF THEY ARE AUTHORIZED TO DO ON BEHALF OF THE INTERNATIONAL, AND THEY DO EXACTLY WHAT THE INTERNATIONAL TELLS THEM TO DO, AND SO YOU'VE GOT THE INTERNATIONAL BY THE HOOK, WHAT IS YOUR CLAIM AGAINST THE AGENT?

[29] MR. LEVINS: THAT THEY WERE A PARTY TO THE CONTRACT. THEY BREACHED THE CONTRACT AS WELL.

[29] THE COURT: THEY ARE ONLY ACTING ON BEHALF OF SOMEONE ELSE. THEY HAVE NO RESPONSIBILITY TO THE CONTRACT.

[29] MR. LEVINS: I JUST DON'T, I DON'T THINK THAT'S ACCURATE. I DON'T HAVE THE CASE RIGHT HERE, BUT I DON'T THINK THAT'S TRUE. I THINK THEY WOULD STILL BE RESPONSIBLE.

[29] THE COURT: ONLY AS AN AGENT THOUGH.

[29] MR. LEVINS: AND AS A PARTY TO THE CONTRACT.

[29] THE COURT: BUT THEY'RE NOT THE PARTY. THEY'RE ACTING ON BEHALF OF SOMEONE ELSE. THEY'RE NOT A PARTY TO THE CONTRACT. YOU'RE TELLING ME THE PRINCIPAL, THE PERSON LIABLE ON THE CONTRACT IS THE INTERNATIONAL UNION; ISN'T THAT RIGHT?

[30] MR. LEVINS: YES, THAT IS THE THEORY THAT THE INTERNATIONAL IS THE UNDISCLOSED PRINCIPAL. 287 WAS THEIR AGENT AND IT'S MY UNDERSTANDING THAT THEY BOTH ARE LIABLE FOR THE BREACH.

[30] THE COURT: WHO BREACHED IT? CAN A - WHO BREACHED THE CONTRACT?

[30] MR. LEVINS: 287 DID AT THE INTERNATIONAL'S INSTIGATION AND ENCOURAGEMENT AND SUPPORT.

[30] THE COURT: SO THE AGENT DID WHAT THE PRINCIPAL TOLD HIM TO DO AND THE PRINCIPAL IS THE ONE WHO IS THE SIGNATORY ON. THE CONTRACT.

[30] SO WHAT IS THE AGENT DOING IN THE LAWSUIT?

[30] MR. LEVINS: THE AGENT, BECAUSE MY UNDERSTANDING IS THAT WHEN THERE'S AN UNDISCLOSED PRINCIPAL, BOTH THE AGENT AND THE PRINCIPAL ARE RESPONSIBLE.

[30] THE COURT: BUT THEY'RE NOT UNDISCLOSED ANYMORE. THEY'RE GOING TO BE RIGHT UP THERE FRONT AND CENTER.

[30] MR. LEVINS: THEY WEREN'T DISCLOSED NOW BUT AT THE TIME OF THE CONTRACT.

[31] I ALSO WANT TO TALK ABOUT THE INTERFERENCE WITH THE CONTRACT CLAIM, YOUR HONOR, BECAUSE I THINK THAT YOU'VE BEEN GIVEN SOME MISINFORMATION BY OPPOSING COUNSEL.

[31] THE COURT: NOW, ISN'T THAT AN ALTERNATIVE THEORY, IN OTHER WORDS, IF THEY ARE PARTY TO A CONTRACT THAT HE CAN'T INTERFERE.

[31] MR. LEVINS: YES, IT IS AN ALTERNATIVE THEORY.

[31] THE COURT: AND SO YOU WANT TO ALLEGE BOTH THAT THEY WERE THE

PRINCIPAL AND AS THE ALTERNATIVE IF THEY WEREN'T THE PRINCIPAL AND OUTSIDE OF THE CONTRACT THAT THEY INTERFERED WITH THE CONTRACT SOLELY BETWEEN GRANITE ROCK AND 287?

[31] MR. LEVINS: THAT'S CORRECT.

[31] THE COURT: AND DO I HAVE JURISDICTION ON THAT?

[31] MR. LEVINS: ABSOLUTELY. FIRST OF ALL, SECTION 301 MUST BE READ EXPANSIVELY, THAT'S WHAT SMITH V. THE EVENING NEWS STATES AND THAT'S ALSO WHAT THE NINTH CIRCUIT CASE OF PAINTING AND DECORATING CONTRACTOR'S ASSOCIATION SAYS, AND, IN FACT, IF YOU RECALL THE PLEADING FROM THE INTERNATIONAL STATED YOU HAVE TO BE A SIGNATORY TO A CONTRACT IN ORDER TO BE HELD LIABLE FOR THE BREACH OF THE CONTRACT BUT 301 DOESN'T SAY THAT BUT 301 SAYS THAT ANY SUIT BASED ON A VIOLATION OF A COLLECTIVE BARGAINING AGREEMENT YOU HAVE JURISDICTION FOR AND WE HAVE ALLEGED CLEARLY THAT THERE WAS A BREACH OF A COLLECTIVE BARGAINING AGREEMENT. UNDER THE, THE PAINTING AND CONTRACTOR'S CASE THE, THE NINTH CIRCUIT STATED, UNEQUIVOCALLY NOT ONLY DO YOU NOT NEED TO BE A PARTY TO A CONTRACT TO, TO BE BOUND TO ITS TERMS BUT THAT IT'S IMMATERIAL IF YOU ARE A PARTY AS LONG AS THERE'S AN ALLEGATION, THERE'S BEEN A BREACH OF THE CONTRACT.

[32] IN WILBUR (PHONETIC) WHICH WE CITE, WHICH IS A THIRD CIRCUIT CASE, VIRTUALLY THE SAME SITUATION CAME UP, AND THE THIRD CIRCUIT UNEQUIVOCALLY AGAIN SAID WHERE YOU HAVE, WHERE YOU HAVE A SITUATION LIKE THIS, LIKE THIS WHERE, WHERE THERE IS AN INTERFERENCE WITH, WITH THE COLLECTIVE BARGAINING AGREEMENT THERE ARE TWO PROBLEMS, FIRST IF THEY ALLEGED, IF THE PLAINTIFF ALLEGED A STATE CLAIM, IT WOULD BE PREEMPTED.

[32] SO YOU KNOW, WE, WE CAN'T LET THE PLAINTIFF ALLEGE A, A STATE CLAIM. IT WOULD BE PREEMPTED BY FEDERAL LAW BECAUSE OF THE DESIRE OF CONGRESS TO HAVE A UNIFORM FEDERAL LAW IN THIS ISSUE.

[33] BUT IF WE DID THAT, THEN THE PLAINTIFF WOULD HAVE NO RIGHT AT ALL, UNLESS THERE WERE PART OF THE FEDERAL COMMON LAW, THE ABILITY TO SEEK REDRESS AGAINST THE, IN THIS CASE THE INTERNATIONAL THAT, THAT CLEARLY INTERFERES WITH THE COLLECTIVE BARGAINING AGREEMENT.

[33] THE COURT: WELL, COUNSEL, I WAS REMISS IN NOT INTRODUCING MY FIVE NEW LAW CLERKS THIS MORNING. THESE ARE ALL LAW STUDENTS WHO JOINED OUR CHAMBERS FOR PURPOSES OF SERVING AS LAW CLERKS THIS SUMMER AND WE WERE CHATTING AT,

AT OUR EARLY MORNING MEETING ABOUT THE DIFFERENCE BETWEEN CONTRACT AND TORT.

[33] YOU ACKNOWLEDGE, DON'T YOU, THAT INTERFERENCE WITH A CONTRACTUAL RELATIONSHIP IS A TORT THEORY, IT'S NOT A BREACH OF CONTRACT THEORY, AND THAT IF YOU ARE A PARTY TO THE CONTRACT, YOU CAN BREACH IT BUT IF YOU'RE A NONPARTY YOU CAN'T BREACH THE ACCOUNT, YOU MIGHT INTERFERE WITH IT AND COMMIT A WRONG BUT ONLY PARTIES TO THE CONTRACT CAN BREACH THE CONTRACT.

[33] DO YOU AGREE WITH THAT OR IS THERE SOMETHING I'M MISSING?

[33] MR. LEVINS: WELL, IF YOU'RE GOING BACK TO THE AGENCY ISSUE. IF YOU'RE AN AGENT YOU DON'T HAVE TO BE A PARTY TO THE CONTRACT OR AN UNDISCLOSED PRINCIPAL. YOU DON'T HAVE TO BE BUT BEARING ON THIS SECOND LINE REGARDING, REGARDING THE WILBUR CASE, I THINK IT'S IMPORTANT TO, TO NOTE WHAT THE COURT SAID IN THAT CASE AND THE COURT SAID IT DOESN'T MATTER WHAT WE CALL THIS. WE CAN CALL THIS A TORT, WE CAN CALL THIS A BREACH OF CONTRACT, IT DOESN'T MATTER.

[34] WHAT MATTERS IS THAT THE FEDERAL COMMON LAW UNDER SECTION 301. AND THE FEDERAL COMMON LAW UNDER SECTION 301 SHOULD INCLUDE THIS BECAUSE, BECAUSE THERE'S A PROPERTY INTEREST THAT EVERY

EMPLOYER AND FOR THAT MATTER UNION HAS IN A COLLECTIVE BARGAINING AGREEMENT.

[34] AND WE SHOULD NOT ALLOW ANY THIRD PARTY TO COME IN AND INTERFERE WITH THAT AS A MATTER OF FEDERAL COMMON LAW.

[34] AND, AND IN ORDER TO; TO HAVE A UNIFORM FEDERAL COMMON LAW AND WE DON'T WANT, FOR EXAMPLE, TO, TO ALLOW THAT KIND OF A CLAIM TO BE ARGUED IN STATE COURT BECAUSE THEN YOU WOULDN'T HAVE UNIFORM BODY OF LABOR LAW. YOU WOULD HAVE STATE LAW AND FEDERAL LAW AND WHAT WILBUR SAID IS FOR THOSE TWO REASONS, TO HAVE IT BE UNIFORM AND TO KEEP THE STATES OUT, WE, WE RECOGNIZE THAT THIS WRONG, WHICH CRIES OUT FOR A REMEDY SHOULD BE A PART OF THE FEDERAL COMMON LAW.

[35] THE COURT: LET ME ASK A QUESTION THAT IS A BIT BEYOND THE MOTION THAT IF THIS IS A CONTRACT WHICH IS NOW REGARDED AS RATIFIED BY THE INTERNATIONAL THROUGH 287 HAS A CLAUSE THAT PROVIDES FOR ARBITRATION OF PROCEEDINGS BEYOND THE LAWSUIT.

[35] WHAT IS YOUR POSITION AS TO WHETHER OR NOT, EVEN IF I, I AGREE WITH YOU AND ALLOW THE INTERNATIONAL INTO THIS LAWSUIT, IT'S A CASE THAT NEEDS TO BE TRIED IN COURT OR WHETHER OR NOT I LOOK

TO THE CONTRACT AND SAY THAT THIS IS THIS ARBITRATION CLAUSE, GO ARBITRATE.

[35] MR. LEVINS: I BELIEVE THAT THE BREACH OF CONTRACT CLAIM WOULD HAVE TO BE, WOULD HAVE TO GO BEFORE AN ARBITRATOR, I HAVEN'T SPECIFICALLY RESEARCHED THAT ISSUE.

[35] I THINK THE INTERFERENCE WITH CONTRACT CLAIM, HOWEVER, CAN BE, CAN BE AND SHOULD BE HEARD BEFORE THE COURT, AND THEREFORE, I THINK IN THE INTEREST OF ECONOMY, THE WHOLE MATTER SHOULD BE HEARD BEFORE THE COURT.

[35] THE COURT: IN OTHER WORDS, I SHOULD IGNORE THE ARBITRATION CLAUSE?

[36] MR. LEVINS: WELL, I WOULDN'T IGNORE IT. I WOULD SAY UNDER THESE CIRCUMSTANCES, UNDER THESE UNUSUAL CIRCUMSTANCES WHERE THERE IS UNUSUAL ALLEGATIONS INVOLVED THAT CLEARLY, FOR THE COURT TO DETERMINE, RATHER THAN BIFURCATE IT, THEN THE COURT SHOULD HEAR IT ALL AT ONCE. AGAIN, I HAVEN'T RESEARCHED THAT PART BUT, BUT –

[36] THE COURT: ALL RIGHT. THANK YOU. ANYTHING FURTHER?

[36] THE COURT: BRIEFLY.

[36] MR. NUSSBAUM: YES. YOUR HONOR, I THINK THE QUESTIONS THAT YOU WERE

ASKING MR. LEVINS WERE EXCELLENT QUESTIONS, AND I THINK THEY SHOWED THE DIFFICULTY WITH THE POSITION THAT GRANITE ROCK IS TAKING.

[36] YOU CALLED IT ZEAL, I'LL CALL IT ZEAL SINCE YOU CALLED IT THAT TERM, TO GET THE INTERNATIONAL INTO THE CASE GRANITE ROCK IS TRYING TO CONCOCT TOGETHER SOME THEORY AND IT LEADS TO ABSOLUTELY ABSURD RESULTS WHICH I THINK YOUR QUESTION HAS BROUGHT FORWARD.

[36] THE IDEA THAT THE UNDISCLOSED PRINCIPAL THAT NOW THEY'RE TALKING ABOUT A CONTRACT WITH THE INTERNATIONAL AND WHERE ALL ALONG THEY WERE SAYING IT WAS A CONTRACT WITH 287 AND THAT SOMEHOW THE INTERNATIONAL WAS A PARTY TO THE CONTRACT AND THE LOCAL MEMBERS OF 287 COULD RATIFY IT ON BEHALF OF THE INTERNATIONAL AND IT -- NONE OF THIS STUFF MAKES ANY SENSE AND IT DOESN'T MAKE ANY SENSE BECAUSE IT DIDN'T HAPPEN AND THAT TAKES ME BACK TO THINGS THAT MR. LEVINS WAS SAYING ABOUT DISCOVERY.

[37] I WANT THE COURT TO KNOW THAT MR. ALOISE WAS DEPOSED FOR TWO DAYS AND THE DEPOSITION WAS CONCLUDED; THAT THE PERSON MOST KNOWLEDGEABLE AT THE INTERNATIONAL WAS DEPOSED.

[37] THAT MR. NETTO WAS DEPOSED AND THAT THE PRINCIPALS OF GRANITE ROCK WERE PRESENT AT THE NEGOTIATIONS WHEN THE CONTRACT WAS FORMED AND THE BEST THEY COULD COME UP IN PLEADING THIS IS IN PARAGRAPH 19 OF THE COMPLAINT AND WHERE THEY TALK ABOUT ALL OF THE THINGS THAT MR. ALOISE DID AFTER THE CONTRACT WAS FORMED INCITING A STRIKE. THAT'S WHAT THEY'RE TALKING ABOUT.

[37] NOTHING ABOUT HIM BEING INVOLVED IN THE CONTRACT FORMATION BECAUSE HE WAS NOT INVOLVED IN THAT. AND THEY HAD AN OPPORTUNITY TO DO THAT AND THEY PUT THEIR BEST EFFORT TO PLEADING SOMETHING AND IT DOESN'T STATE A CAUSE OF ACTION FOR BREACH OF CONTRACT UNDER SECTION 301.

[38] WITH REGARD TO THE TORT THEORIES, I WON'T GO INTO IT MORE. I THINK OUR BRIEF SETS IT OUT VERY, VERY CLEARLY FOR YOU THAT, THAT THE RULE, THAT THE RULE GENERALLY IS THAT THOSE TORT THEORIES CAN'T BE PLED.

[38] THE NINTH CIRCUIT HAS NOT SPOKEN DEFINITIVELY ON IT. TWO COURTS IN THE NINTH CIRCUIT HAVE RULED IN FAIRLY WELL REASONED OPINIONS, AND I'LL ASK YOU TO LOOK AT THOSE TORT THEORIES, SHOULD NOT BE INCLUDED BECAUSE THOSE TORT THEORIES DON'T COMPORT WITH THE PURPOSE OF SECTION 301 WHICH WAS TO PROVIDE A CAUSE OF ACTION WITH REGARD

TO THE BREACH OF CONTRACT BY PARTIES TO THE CONTRACT.

[38] THESE TORT THEORIES HAVE TO DO WITH NONPARTIES. THAT ISN'T WHAT SECTION 301 WAS ABOUT. AND THAT'S WHAT THE COURTS SAY AND THAT'S THE REASON THAT THEY WENT AHEAD AND CAME TO THAT CONCLUSION.

[38] THE COURT: VERY WELL.

[38] MR. NUSSBAUM: FINALLY ON THE ARBITRATION POINT YOU RAISED IT SHOWS THAT THE PROBLEMS THAT WOULD BE CREATED IN TRYING TO ACCEPT ANY OF THE POSITIONS ADVANCED BY MR. LEVINS, I WOULD SAY THAT WE WOULD HAVE TO GO TO ARBITRATION, BUT I WOULD SAY WHERE WE REALLY HAVE TO GO IS OUT OF YOUR COURTROOM BECAUSE THE COMPLAINT SHOULD BE DISMISSED AND WITHOUT LEAVE TO AMEND BECAUSE THEY CAN STATE SOMETHING WHICH WOULD DRAG US BACK IN HERE, BUT WE'LL BE BACK HERE AGAIN AND WE'LL GET OUT AND WE HAVE ALREADY PUT THEM ON NOTICE THAT WE'RE FILING A RULE 11 MOTION. WE SHOULD BE LET OUT NOW TO NOT WASTE OUR TIME, YOUR TIME, AND OUR CLIENT'S MONEY.

[39] THANK YOU.

[39] THE COURT: THANK YOU.

[39] MR. LEVINS: YOUR HONOR, MAY I SAY ONE THING BECAUSE I GOT SIDETRACKED WHEN I WAS MAKING MY OPENING STATEMENT HERE?

[39] I WOULD LIKE TO TALK ABOUT THE TWO CASES THAT OPPOSING COUNSEL –

[39] THE COURT: I CAN LOOK AT THEM. IF IT'S CASE LAW I CAN LOOK AT THEM.

[39] MR. LEVINS: OKAY. THEY'RE VERY DISTINGUISHABLE.

[39] THE COURT: MR. BEESON, YOU'RE A VOICE THAT I MISS HEARING WHENEVER I HAVE THESE MATTERS BEFORE US. I UNDERSTAND THAT THE LOCAL 287 IS NOT TAKING A POSITION ON THIS MOTION.

[39] MR. BEESON: WE HAVE FILED A PAPER TO THE EFFECT THAT WE DO NOT OPPOSE IT.

[40] THE COURT: VERY WELL. THANK YOU VERY MUCH. THE MATTER IS SUBMITTED.

[40] MR. LEVINS: THANK YOU, YOUR HONOR.

[40] MR. NUSSBAUM: THANK YOU, YOUR HONOR. (WHEREUPON, THE PROCEEDINGS IN THIS MATTER WERE CONCLUDED.)

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY · CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE, INCLUSIVE, CONSTITUTED A TRUE, FULL AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED TRANSCRIPTION TO THE BEST OF MY ABILITY.

/s/

IRENE RODRIGUEZ , CSR,. CRR
CERTIFICATE NUMBER CSR 8074

[Dated May 23, 2006]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF

CALIFORNIA

SAN JOSE DIVISION

Granite Rock Company,

Plaintiff,

v.

International Brotherhood of Teamsters, Freight, Construction, General Drivers, Warehousemen & Helpers, Local 287, et al.,

Defendants

NO. C 04-02767 JW

ORDER GRANTING MOTION TO DISMISS WITH LEAVE TO AMEND

Plaintiff Granite Rock alleges that Defendants International Brotherhood of Teamsters, Freight, Construction, General Drivers, Warehousemen & Helpers, Local 287 ("Local") and International Brotherhood of Teamsters ("IBT") violated a collective bargaining agreement. Local and IBT are each commonly known as and doing business as a "labor organization" within the meaning of 29 U.S.C. § 185. Local represents certain Granite Rock

employees, and is the collective bargaining representative for employees engaged as drivers at Granite Rock's San Jose, California facility.

Presently before the Court is IBT's Motion to Dismiss. Local does not oppose IBT's motion. (Docket Item No. 157). The Court held a hearing on IBT's Motion on May 22, 2006. Based on the statements of counsel at the hearing and on the papers submitted, IBT's Motion to Dismiss is GRANTED with leave to amend.

Under Rule 12(b)(6), a complaint may be dismissed for failure to state a claim upon which relief can be granted. FED. R. Civ. P. 12(b)(6). A claim may be dismissed as a matter of law for one of two reasons: "(1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal theory." *Robertson v. Dean Witter Reynolds, Co.*, 749 F.2d 530, 534 (9th Cir. 1984). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). In determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint. *Schneider v. California Dept. of Corrections*, 151 F.3d 1194, 1197 (9th Cir. 1998) ("The focus of any Rule 12(b)(6) dismissal ... is the complaint.")

In the SAC, Granite Rock alleges that there was a ratified collective bargaining agreement between

Local and Granite Rock and that Local violated the agreement by engaging in an unlawful strike. Granite Rock further alleges that IBT is also liable for damages caused by the strike because IBT and Local were "in an agency relationship." SAC ¶ 18. IBT contends that it cannot be held liable for breach of the Agreement because Granite Rock has not alleged that it was a party to the Agreement.

At oral argument, counsel for Granite Rock explained that IBT should be viewed as a party to the Agreement because IBT and Local were in an agency relationship where IBT was an undisclosed principal that authorized Local to enter into the Agreement on IBT's behalf, and that IBT authorized Local to ratify the Agreement on IBT's behalf. To the extent that Granite Rock intended to allege these facts in the SAC, the SAC's single statement that IBT and Local "were in an agency relationship at all times hereto in which the IBT exerted actual control over Local 287" is insufficient even under the liberal requirements of Fed. R. Civ. Pro. 8. The Court dismisses the IBT from the SAC but grants Granite Rock leave to amend the allegations in the SAC to support its theory of the case as stated at the hearing. The Court declines to address, at this time, the question of whether a claim for tortious interference alone would state a claim under 29 U.S.C. 185.

Dated: May 23, 2006 /s/

JAMES WARE
United States District Judge

[Dated, June 8, 2006].

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

GRANITE ROCK COMPANY, Plaintiff, v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, FREIGHT, CONSTRUCTION, GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 287; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Defendants.	Case No. C 04 2767 JW **THIRD AMENDED COMPLAINT FOR DAMAGES** **(DEMAND FOR JURY TRIAL)**

COMES NOW, the Plaintiff and complains against Defendants as follows:

JURISDICTION

1. This is a suit for damages pursuant to Section 301(a) of the Labor Management Relations Act, 29

U.S.C. § 185(a). This Court has jurisdiction under Section 301 and under 28 U.S.C. § 1337.

VENUE

2. Venue is proper in the Northern District of California because a substantial part of the events or omissions giving rise to the claims occurred in this District.

INTRA-DISTRICT ASSIGNMENT

3. Assignment of this action to the San Jose Division of the United States District Court for the Northern District of California is proper under Civil Local Rule 3-2 because a substantial part of the events or omissions giving rise to the claims occurred in Santa Clara County. Civil L.R. 3-2(e).

PARTIES

4. Plaintiff Granite Rock Company ("Plaintiff" or "Granite Rock") is, and at all times material hereto was, a California corporation engaged in the business of supplying ready mixed concrete for commercial use with its principal office at 350 Technology Drive, Watsonville, California 95077. In the past twelve months, Granite Rock has purchased more than $50,000 worth of goods and supplies directly from points located outside the State of California. Therefore, Granite Rock is an "employer" as that term is defined in the Labor Management Relations Act of 1947, as amended.

5. Defendant International Brotherhood of Teamsters, Freight, Construction, General Drivers, Warehousemen and Helpers, Local No. 287

(hereinafter "Defendant Local 287") is, and at all times material hereto was, a voluntary, unincorporated association, commonly known as and doing business as a labor organization within the meaning of 29 U.S.C. section 185. Defendant Local 287 maintains an office and place of business at 1452 North Fourth Street, San Jose, California 95112. At all times material hereto, Defendant Local 287 acted as a labor organization that represented certain Granite Rock Company employees at Granite Rock's San Jose Concrete facility, referred to as the "Berryessa Plant." Defendant Local 287 is the collective bargaining representative for employees engaged as drivers at the Berryessa Plant. At all times material hereto, Defendant Local 287 was a local union chartered by the International Brotherhood of Teamsters.

6. Defendant International Brotherhood of Teamsters (hereinafter "Defendant IBT") is, and at all times material hereto was, a voluntary, unincorporated association, commonly known as and doing business as a labor organization within the meaning of 29 U.S.C. section 185. Defendant IBT charters local unions throughout California, including Defendant Local 287. Plaintiff alleges, based on limited discovery and with the expectation that evidentiary support will be obtained after a reasonable opportunity for further discovery, that Defendant Local 287 acted as an agent on behalf of Defendant IBT at all times material hereto for purposes of collective bargaining. Rome Aloise, the Administrative Assistant to the General President of Defendant IBT, played a key leadership role in the events that are the basis for this lawsuit. Rome

Aloise is, and during all material times hereto was, an agent of Defendant IBT.

7. Rome Aloise, who played a key leadership role in the events giving rise to this lawsuit, was an agent of Defendant IBT at all material times, and acted on behalf of Defendant IBT. Mr. Aloise received orders directly from Defendant IBT and had a business card stating his position with Defendant IBT. Defendant IBT provided Aloise with a cellular telephone, which Plaintiff believes he used to communicate regarding Plaintiff. Plaintiff also believes that discovery will show that Defendant IBT reimbursed Mr. Aloise for his travel expenses related to his activities with respect to the Plaintiff in 2004.

8. Plaintiff Granite Rock Company is, and at all times material hereto was, an employer in an industry affecting commerce as defined in 29 U.S.C. section 142(1) and (3) and 29 U.S.C. section 152.5(5), and within the meaning of 29 U.S.C. section 185.

9. Under section 301(a) of the Labor Management Relations Act (29 U.S.C. section 185(a)), United States district courts have original jurisdiction over actions arising out of violations of contracts between labor organizations, regardless of citizenship and amount.

FACTUAL ALLEGATIONS

10. From the period of March 1, 1999, to April 30, 2004, Plaintiff and Defendant Local 287 were parties to a collective bargaining agreement that set forth the terms and conditions of employment for bargaining unit employees at Granite Rock's San Jose Concrete facility.

11. In March 2004, Plaintiff and Defendant Local 287 commenced preliminary negotiations on a new agreement. Thereafter, the parties continued negotiations over the course of the next three months.

12. On April 30, 2004, Plaintiff submitted a "Final Offer" to Defendant Local 287 for review. George Netto, Business Representative for Local 287, provided a copy of this proposal to Rome Aloise. A "Revised Final Offer" was submitted on or about May 21, 2004. Plaintiff's offers were rejected.

13. Rome Aloise assisted Local 287 in the negotiations with Plaintiff. For example, Aloise provided advice and input to Defendant Local 287 regarding Plaintiff's April 30, 2004 offer. Aloise instructed Local 287 that this proposal was not acceptable. Plaintiff believes that Aloise provided advice and input to Local 287 regarding other proposals that Plaintiff made to Local 287 during the negotiations. Aloise also provided information and assistance to Local 287 regarding the negotiations over health plan benefits. When Plaintiff requested information from Local 287 regarding a health plan that was agreed to in a separate collective bargaining agreement with different employers, Local 287 told Plaintiff that the information would have to be provided by Aloise and that Aloise would explain the agreement to Plaintiff. Plaintiff did not receive the requested information until almost two months after it was requested. Plaintiff believes that Aloise was the reason Local 287 did not provide this information to Plaintiff. Aloise also prepared a document comparing the Teamsters' agreements for Plaintiff's San Jose Concrete and Peninsula Concrete

facilities, which he provided to Local 287. Local 287 presented the document drafted by Aloise to Plaintiff during the negotiations. Further, Aloise communicated to Plaintiff that he was willing to attend negotiations between Plaintiff and any Teamsters local before the Teamsters Joint Council would approve a strike sanction. Aloise also attended negotiation sessions with other unions involved in striking Plaintiff's facilities and proposed negotiation meetings and strategies to Plaintiff on behalf of other Teamsters-affiliated local unions, including a "committee of the whole" approach of bargaining collectively with all the relevant Teamsters-affiliated local unions in a single session. Aloise has claimed that most of such proposals were without the approval, or the need for approval, of the respective local unions or their business representatives.

14. Plaintiff believes, and on that basis asserts, that Aloise participated in negotiating the Agreement as a representative of Defendant IBT and to benefit Defendant IBT and other Teamsters locals. Plaintiff believes that further evidentiary support will be obtained after a reasonable opportunity for further discovery.

15. In early June 2004, after the former collective bargaining agreement expired, the bargaining unit employees at Plaintiff's San Jose Concrete facility went out on strike.

16. Subsequent to the commencement of the strike, the parties met again to negotiate regarding the outstanding issues, with the key issue being the total economic package. On the evening of Thursday, July 1, 2004, Plaintiff and Defendant

Local 287 met for negotiations. At approximately 4:00 a.m. on Friday, July 2, 2004, the parties reached agreement on terms for a new four-year collective bargaining agreement covering the term of May 1, 2004 through April 30, 2008 (the "Agreement").

17. At the conclusion of the session, George Netto, Business Representative for Defendant Teamsters Local 287, told Plaintiff's President and Chief Executive Officer, Bruce Woolpert, that he would present the Agreement to the bargaining unit employees for ratification at 9:00 a.m. that same day (Friday, July 2, 2004), and promised that he (Netto) would recommend approval. Netto also stated that the pickets would be removed.

18. The Agreement maintained the same contract language as the previous agreement except as noted in Plaintiff's July 2, 2004 "Final Offer." The grievance and arbitration provisions set forth in Section 20 of the prior collective bargaining agreement, as well as the no-strike language, were to remain the same in the new Agreement (with one exception not relevant to this matter). At the conclusion of the session on Friday, July 2, 2004, the parties discussed preparing a Back to Work Agreement at a later date.

19. The very first cellular telephone call that Netto made after the Agreement was reached was to Rome Aloise, whom he called at approximately 7:01 a.m. on July 2, 2004. The call lasted approximately five minutes.

20. On or about 9:00 a.m. on Friday, July 2, 2004, a ratification meeting was held with the Granite

Rock Company bargaining unit employees at Local 287's headquarters. At the meeting, the Agreement was presented orally to the Local 287 members and a vote was held. Plaintiff is informed and believes that the employees voted affirmatively to ratify the Agreement and/or ratified the Agreement in effect by approving the only item of possible contention. That same day, several employees contacted Plaintiff regarding returning to work. Later that day, Netto contacted Plaintiff and stated that the Agreement was ratified.

21. Plaintiff is informed and believes that Defendant IBT was aware of the existence of the Agreement as of July 2, 2004. Netto telephoned Rome Aloise again that afternoon after the Agreement was ratified.

22. Plaintiff believes that discovery will show that, at some point before Tuesday, July 6, 2004, it became apparent to Defendant Local 287 and to Aloise that they had to apply pressure to Plaintiff or the Back to Work Agreement would not include a blanket hold-harmless agreement for Teamsters Local 287, Defendant IBT, and Teamsters Locals 853, 890, and/or 912 ("Teamsters Locals") for damage caused by the unlawful strike, and by the Teamsters Locals honoring the unlawful Local 287 picket line and violating the Teamsters Locals' collective bargaining agreements.

23. Therefore, on Monday, July 5, 2004, in repudiation of the Agreement and in violation of its provisions, individuals acting on behalf of Defendant Local 287 and/or (discovery will show) Rome Aloise, acting on behalf of Defendant IBT, called union members at their homes and instructed, authorized,

instigated, and encouraged them to not return to work.

24. The next day (Tuesday, July 6, 2004), Defendant Local 287 informed Plaintiff that its members would not return to work until Plaintiff executed a Back to Work Agreement that included a hold-harmless agreement guaranteeing amnesty for Local 287 and its members and for the Teamsters Locals and employees at Plaintiff's other facilities in three counties covered under separate collective bargaining agreements. Thus, Defendants Local 287 took a position that would require Plaintiff to drop its previously issued grievances against the respective unions for violating the no-strike provisions of their individual labor contracts as a condition to honoring and complying with the Agreement reached on July 2, 2004.

25. Additionally, the Back to Work Agreement proposals submitted to Plaintiff contained broad language that would have prevented Plaintiff from pursuing any unfair labor practice charges, grievances, lawsuits and/or other administrative procedures against "any labor organization" that arose out of the then-existing labor dispute. This broad language, which was never executed, would have protected Defendant IBT from any liability resulting from its involvement and the involvement of its agent, Rome Aloise, in inducing the unlawful strike. Plaintiff believes that Defendant IBT instructed, ratified and/or encouraged Local 287 to take this position, which would benefit not only other Teamsters affiliated local unions besides Defendant Local 287, but Defendant IBT itself. Plaintiff believes that further evidentiary support

will be obtained after a reasonable opportunity for further discovery.

26. Rome Aloise spoke with George Netto numerous times regarding the Back to Work Agreement. Aloise also telephoned Plaintiff regarding ideas for the Back to Work Agreement, and told Plaintiff "the Teamsters" would settle the dispute involving Defendant Local 287 and push settlement of a dispute involving another of Plaintiff's facility regarding a separate collective bargaining agreement if Plaintiff agreed to the proposed Back to Work Agreement. Plaintiff believes that Rome Aloise, acting on behalf of Defendant IBT, instructed Defendant Local 287 that it was not to honor the Agreement unless and until Plaintiff agreed to a Back to Work Agreement with a broad hold-harmless provision that would protect Defendant IBT in addition to the Teamsters Locals from liability related to the strike.

27. On August 22, 2004, Defendant Local 287 held another ratification vote, during which the bargaining unit employees again approved the Agreement, which contained the same terms as it did when it was ratified on July 2, 2004. Defendant Local 287 held this ratification vote because Rome Aloise, acting on behalf of Defendant IBT, advised Local 287 that it could finally settle the dispute.

28. Defendant Local 287 engaged in an unlawful strike that breached the terms of its Agreement until September 13, 2004. Additionally, Plaintiff's employees covered under separate collective bargaining agreements with different local unions, affiliated with Defendant IBT or other international

unions, refused to cross the Teamsters' unlawful picket line at Plaintiff's other facilities.

29. Defendant Local 287 refused to abide by the terms and conditions of the Agreement. The Agreement includes a valid no-strike clause that precluded the work stoppage. Plaintiff duly performed all conditions of the Agreement on its part to be performed, such as calling people to work shifts consistent with the Agreement. By its actions and conduct alleged herein, Defendant Local 287 breached the Agreement, and, in particular, the no-strike obligation.

30. Rome Aloise played a leadership role in the strike, encouraging employees to continue the work stoppage, giving speeches to employees and union representatives, writing letters to representatives of various local unions, including George Netto, Business Representative for Defendant Teamsters Local 287, writing letters to employees directly, rallying the various Teamsters locals to cooperate in striking Plaintiff's facilities and support the strike at the San Jose Concrete facility financially and otherwise, and meeting with local union representatives, including Netto, to discuss strategy regarding the strike. Aloise also made representations to Plaintiff's Director of Human Resources, Shirley Ow, that he had the authority of Defendant IBT to settle the unlawful strike.

31. Plaintiff believes that Rome Aloise and Defendant IBT's actions with respect to the unlawful strike were malicious and/or intentional efforts to interfere with the Agreement and were designed to cause, induce, instigate and/or encourage Local 287's breach of the Agreement's no-strike clause.

32. Throughout the unlawful strike, Plaintiff's employees who were members of Defendant Local 287 received strike benefits from Defendant IBT as long as they did not return to work. In granting the out-of-work benefits, Defendant IBT ratified the unlawful strike as being of benefit both to it and to Defendant Local 287. By providing these benefits, Defendant IBT also allowed the strike to continue for a protracted period of time and encouraged employees to remain on strike to receive the benefits. Defendant IBT only provided the benefits to employees who remained on strike for a certain number of days.

33. During all times material hereto, Defendant IBT financially supported Defendant Local 287. In 2001, Defendant IBT provided a loan of $1.2 million dollars to Defendant Local 287 that was in effect throughout 2004. Defendant IBT required Defendant Local 287 to comply with numerous conditions to obtain and keep the loan. By its loan, Defendant IBT financially supported Defendant Local 287 and, in doing so, exerted actual control over Defendant Local 287. Defendant IBT also required Defendant Local 287 to submit monthly reports regarding its financial affairs and to undergo financial audits.

34. As a result of the actions of Defendant IBT, its officers, employees, and agents (including both Defendant Local 287 and Rome Aloise), Plaintiff has been deprived of the benefits of its Agreement. Without the Agreement, Plaintiff was deprived, inter alia, of the benefits of the no-strike protections contained in the contract as well as the labor peace

and stability generally attendant to a collective bargaining agreement.

35. On May 31, 2006, a unanimous panel of the National Labor Relations Board in Washington, D.C., held that the Agreement, as a matter of federal law, must given retroactive effect to July 2, 2004. (See, 347 NLRB No. 2, pp. 1-2.)

36. By reason of the aforesaid breach of the Agreement, Plaintiff was unfairly and improperly prevented from conducting its normal business activities of supplying ready mix concrete for its commercial customers. As a result of Defendants' actions, Plaintiff suffered extensive monetary damage, including, but not limited to, loss of business and market share, harm to its business reputation, wasted overhead expenses, additional expenses required to maintain business operations during the unlawful strike, and expenses associated with recruiting and training employees to replace employees who left Plaintiff's employment as a direct result of the unlawful strike.

FIRST CLAIM FOR RELIEF

Breach Of Contract Against Defendant Local 287

(Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a))

37. Plaintiff alleges the facts contained in Paragraphs 1 through 36 above, as though set forth herein in their entirety.

38. The Agreement to which both Plaintiff and Defendant Local 287 were parties, contained an

express no-strike provision and a mandatory grievance procedure and existed as of July 2, 2004.

39. Defendant Local 287 breached the Agreement by continuing to engage in a strike that violated the no-strike provision of the Agreement until September 13, 2004. Alternatively, Defendant Local 287 also committed a breach by violating its promise to present the Agreement to the bargaining unit employees on July 2, 2004, and to recommend approval of the Agreement.

40. Defendant Local 287's breach caused Plaintiff to suffer extensive monetary damages, including, but not limited to, lost profits and market share, damage to its business reputation, expenses required to maintain business operations during the unlawful strike, wasted overhead expenses and expenses incurred to recruit and train new employees.

41. Regardless of the theories alleged below, Defendant Local 287, as signatory to the Agreement, is liable under Section 301 for Plaintiff's damages resulting from the breach of the Agreement.

SECOND CLAIM FOR RELIEF

Interference/Inducement of Breach of Contract Against Defendant IBT

(Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a))

42. Plaintiff repeats the allegations contained in Paragraphs 1 through 41 above, as though set forth herein in their entirety.

43. Plaintiff alleges that Defendant IBT was aware of the existence of the Agreement as of July 2, 2004, the date on which the Agreement became effective.

44. Plaintiff alleges that, by the actions alleged above involving Defendant IBT and/or its agent, Rome Aloise, Defendant IBT induced Defendant Local 287 to violate its promises to, and/or to breach its Agreement with Plaintiff, including, but not limited to, the no-strike clause in the Agreement.

45. Plaintiff believes that Defendant IBT induced Local 287 to breach the Agreement and interfered with Plaintiff's Agreement in order to put pressure on Plaintiff to agree to a Back to Work Agreement that included hold-harmless provisions that would protect Defendant IBT, Local 287 and the Teamsters Locals, all of which are affiliated with the IBT, from liability for their actions related to the unlawful strike.

46. Plaintiff alleges that Rome Aloise and Defendant IBT's actions with respect to the unlawful strike were taken maliciously with intent to interfere with the Agreement and Plaintiff's benefit of the no-strike provision.

47. Plaintiff asserts that a causal relationship exists between Rome Aloise and Defendant IBT's participation in and support of the unlawful strike and the breach of the Agreement.

48. As a direct result of the breach of the Agreement, Plaintiff has suffered extensive damages, including, but not limited to, lost profits and market share, expenses required to maintain

business operations during the unlawful strike, and expenses incurred to recruit and train new employees.

49. Congress enacted Section 301 of the Labor Management Relations Act (29 U.S.C. § 185) to ensure the enforceability of collective bargaining agreements under the federal common law. Defendant IBT's actions violated Section 301 and the federal common law because Defendant IBT's actions created a breach of the Agreement, a federally protected collective bargaining agreement, in existence as of July 2, 2004.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays as follows:

1. For damages according to proof;

2. That Plaintiff be allowed its costs of suit and attorneys' fees herein incurred;

3. For such other and further relief that the facts of this Complaint entitle Plaintiff; and,

4. For such other and further relief as the Court may deem proper and just.

Dated: June 8, 2006

/s/
GARRY G. MATHIASON
ALAN S. LEVINS
LITTLER MENDELSON
A Professional Corporation
Attorneys for Plaintiff
GRANITE ROCK
COMPANY

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial as provided by Rule 38 of the Federal Rules of Civil Procedure.

Dated: June 8, 2006

/s/

ALAN S. LEVINS
LITTLER MENDELSON
A Professional Corporation
Attorneys for Plaintiff
GRANITE ROCK
COMPANY

[Dated, October 5, 2006]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Granite Rock Company, Plaintiff, v. International Brotherhood of Teamsters, Freight C, et al., Defendants.	NO. C 04-02767 JW **ORDER GRANTING DEFENDANT INTERNATIONAL BROTHERHOOD OF TEAMSTERS' MOTION TO DISMISS WITH PREJUDICE**

I. INTRODUCTION

Plaintiff Granite Rock Company ("Plaintiff") brings this suit for breach of contract and tortious inducement with contract under Section 301 of the Labor Management Relations Act ("LMRA"). Plaintiff suffered financial loss after its bargaining unit employees participated in a strike that was allegedly facilitated by Defendant International Brotherhood of Teamsters ("Defendant IBT").

Before the Court is Defendant International Brotherhood of Teamsters' Motion to Dismiss

Plaintiff's Third Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The Court conducted a hearing on September 11, 2006. Based upon the papers submitted to date and the oral arguments of counsel, the Court GRANTS Defendant International Brotherhood of Teamsters' Motion to Dismiss because an action for tortious interference with contract does not lie under Section 301(a).

II. BACKGROUND

The Plaintiff alleges the following:

Between March 1, 1999 and April 30, 2004, Plaintiff and Freight, Construction, General Drivers, Warehousemen, and Helpers, Local No. 287 ("Defendant Local 287") were parties to a Collective Bargaining Agreement ("CBA") that defined the terms of employment for the bargaining unit employees at Plaintiff's San Jose Concrete facility. (Third Amended Complaint for Damages, hereafter, "TAC," ¶ 10, Docket Item No. 164.) For three months beginning in March 2004, Plaintiff and Defendant Local 287 took part in negotiations on a new CBA. (TAC ¶ 11.) During this time, the Plaintiff submitted two Final Offers to Defendant Local 287, on April 30, 2004 and May 21, 2004, and both were rejected. (TAC ¶ 12.) Instrumental to these negotiations were George Netto ("Netto"), Business Representative for Defendant Local 287, and Rome Aloise ("Aloise"), the Administrative Assistant to the General President of Defendant IBT. (TAC ¶¶ 12, 13.)

Aloise participated in negotiations on at least five instances as a representative of Defendant IBT: (1) instructing Local 287 that Plaintiff's April 30, 2004 Final Offer was not acceptable; (2) providing

information to Plaintiff concerning health plan arrangements that Local 287 had agreed to with other employees; (3) preparing a document for Local 287 comparing the agreements for the Teamsters at two of Plaintiff's facilities; (4) proposing to Plaintiff that he attend negotiations between Plaintiff and any Teamsters Local before the Teamsters Joint Council would approve strike sanctions; (5) participating in collective bargaining with other unions whose members were participating in strikes against Plaintiff's facilities. (TAC ¶ 13.)

In early June 2004, the existing CBA between Plaintiff and Defendant Local 287 expired, and the bargaining unit employees at Plaintiff's San Jose Concrete facility commenced on strike. (TAC ¶ 15.) Negotiations between Plaintiff and Defendant Local 287 recommenced on July 1, 2004, and at 4 AM on July 2, 2004, the parties agreed on a four-year CBA, covering the period between May 1, 2004 and April 30, 2008, which substantially mirrored the expired CBA except as noted in Plaintiff's July 2, 2004 Final Offer. (TAC ¶¶ 16, 18.) At that time, Netto told Plaintiff's President and Chief Executive Officer Bruce Woolpert that he would present the CBA to the bargaining unit employees that morning at 9 AM, recommend their approval, and that the pickets would be removed. (TAC ¶ 17.) The agreement as reached on July 2, 2004 included a no-strike clause. (TAC ¶ 18.)

The bargaining unit employees approved the new CBA on July 2, 2004. (TAC ¶ 20.) On Monday, July 5, 2004, several individuals acting on behalf of Defendant Local 287, and Aloise, acting on behalf of Defendant IBT, called bargaining unit employees to

encourage or instruct them not to return to work. (TAC ¶ 23.) On July 6, 2004, Defendant Local 287 told Plaintiff that its members would return to work only after Plaintiff signed a Back-to-Work Agreement that guaranteed amnesty for Defendant Local 287 and its members, for the Teamsters Locals, and for Plaintiff's employees at facilities in three other counties to whom separate CBAs applied. (TAC ¶ 24.) The proposed CBA received by Plaintiff contained language that would have shielded Defendant IBT from liability, at the insistence of Aloise. (TAC ¶ 25.)

On August 22, 2004, the bargaining unit employees again approved the July 2, 2004 CBA. (TAC ¶ 27.) The strike continued in violation of the CBA's terms until September 13, 2004. (TAC ¶ 28.) Aloise involved himself in the strike by encouraging employees to continue, giving speeches to the employees and union representatives, writing letters to representatives of various local unions, and representing to the Plaintiff's Director of Human Resources, Shirley Ow, that he was authorized by Defendant IBT to settle the strike. (TAC ¶ 30.) Plaintiff's employees who were members of Defendant Local 287 received strike benefits from Defendant IBT for remaining away from work, after the strike had been ongoing for a given number of days. (TAC ¶ 32.)

On July 9, 2004, the Plaintiff filed this action for breach of contract and tortious interference with contract, naming Local 287 and IBT as Defendants. (*See* Docket Item No. 1.) Plaintiff filed its Third Amended Complaint on June 8, 2006. (*See* Docket Item No. 164.) Plaintiff's two Claims for Relief are

both based on asserted violations of Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a). Plaintiff's First Claim for Relief is asserted against Defendant Local 287 for breach of contract. (TAC 37-41.) Plaintiff's Second Claim for Relief is asserted against Defendant IBT for tortious interference or inducement of breach of contract. (TAC 42-49.)

Defendant IBT moves for dismissal of Plaintiff's Third Amended Complaint without leave to amend pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Defendant IBT's Notice of Motion and Motion to Dismiss, hereafter, "Motion," at 1, Docket Item No. 164.)

Plaintiff contends that Section 301(a) of the LMRA has been interpreted broadly by the United States Supreme Court and the Ninth Circuit and that the Ninth Circuit has previously permitted non-signatory parties and non-contract causes of action in Section 301 claims. (Plaintiff Granite Rock's Memorandum of Points & Authorities in Opposition to Defendant IBT's Motion to Dismiss, hereafter, "Opposition" at 4, Docket Item No. 178.)

III. STANDARDS

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed against a defendant for failure to state a claim upon which relief can be granted against that defendant. Dismissal may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistrer v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990); *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530-, 533-534

(9th Cir. 1984). For purposes of evaluating a motion to dismiss, the court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). Any existing ambiguities must be resolved in favor of the pleading. *Walling v. Beverly Enters.*, 476 F.2d 393, 396 (9th Cir. 1973).

However, mere conclusory allegations couched in factual allegations are not sufficient to state a cause of action. *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *see also McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988). A complaint should not be dismissed under Rule 12(b)(6) unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Moore v. City of Costa Mesa*, 886 F.2d 260, 262 (9th Cir. 1989). Courts may dismiss a case without leave to amend if the plaintiff is unable to cure the defect by amendment. *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000).

The Federal Rules of Civil Procedure have established a liberal standard of "notice pleading." A plaintiff's factual pleading is sufficient if it contains "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2) & (e)(1). The Supreme Court has explained that the Federal Rules "do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v.*

Gibson, 355 U.S. 41, 47 (1957) (quoting Fed. R. Civ. P. 8(a)(2)). The Supreme Court has reaffirmed the liberal notice-pleading requirements by stating that a prima facie case is "an evidentiary standard, not a pleading requirement." *Swierkiewicz v. Sorema*, 534 U.S. 506, 510 (2002).

IV. DISCUSSION

Defendant IBT challenges the validity of Plaintiff's Second Claim for Relief for tortious inducement of breach of contract under Section 301(a) of the LMRA on the grounds that Section 301(a) does not encompass tort-based claims for relief against non-parties. (Motion at 1.)

Section 301(a) of the LMRA ("Section 301(a)") provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (2006). To establish a claim based on Section 301(a) in the Ninth Circuit, Plaintiff's suit must concern a claim of violation of a contract that was formed "between" an employer and a labor organization or "between" labor organizations.

Alvarez v. Erickson, 514 F.2d 156, 161 (9th Cir. 1975).

Here, the Plaintiff has alleged that Defendant Local 287, a labor organization, violated a contract that it formed with the Plaintiff, an employer. The Plaintiff alleges damages based on two claims for relief: Defendant Local 287's breach of contract and Defendant IBT's tortious inducement of that breach. The Court must make findings regarding the terms of the CBA and their alleged breach to resolve each of Plaintiff's claims for relief. Jurisdiction over Defendant IBT is proper if Section 301(a) supports the Court's jurisdiction over tort claims against non-parties to the CBA.

Defendant IBT contends that Plaintiff's tort claim is not legally cognizable under the LMRA. (Motion at 1.) There exists a circuit split on the question of whether Section 301(a) encompasses claims for tortious interference with a CBA against non-signatories to that agreement. *Int'l Union, United Mine Workers of America v. Covenant Coal Corp.*, 977 F.2d 895, 897 (4th Cir. 1992). The majority of circuits, including the First, Second, Fourth, Fifth, Sixth, Seventh, and Tenth, have either held explicitly that tortious interference claims do not lie under Section 301(a), or have impliedly reached this conclusion by holding that Section 301(a) suits against non-signatories to a contract are disallowed. *Bowers v. Ulpiano Casal, Inc.*, 393 F.2d 421, 424 (1st Cir. 1968); *Aacon Contracting Co. v. Ass'n of Catholic Trade Unionists*, 276 F.2d 958 (2nd Cir. 1960), aff'g and adopting 178 F. Supp. 129, 130 (E.D.N.Y. 1959); *Int'l Union, United Mine Workers v. Covenant Coal Corp.*, 977 F.2d 895, 897

(4th Cir. 1992); *Carpenters Local Union No. 1846 v. Pratt-Farnsworth*, 690 F.2d 489, 501 (5th Cir. 1982); *Service, Hosp., Nursing Home & Public Employees Union, Local No. 47 v. Comm. Prop. Servs., Inc.*, 755 F.2d 499, 506 (6th Cir. 1985); *Loss v. Blankenship*, 673 F.2d 942, 947-48 (7th Cir. 1982); *United Food & Comm. Workers Union, Local No. 1564 v. Quality Plus Stores Inc.*, 961 F.2d 904, 906 (10th Cir. 1992). The Ninth Circuit has not yet ruled definitively on this issue, but two district courts in this circuit have also held that there is no Section 301(a) claim for tortious interference with contract. *Teamsters Local Union No. 117 v. Sysco Food Serv. of Seattle, Inc.*, 2005 WL 1643890, at *7 (W.D. Wa. July 11, 2005); *Wynn v. National Broadcasting Company, Inc.*, 234 F. Supp. 2d 1067 (C.D. Cal. 2002).

The leading case permitting plaintiffs to bring Section 301(a) tortious interference claims is under the federal common law of labor contracts is *Wilkes-Bane Publishing Co. v. Newspaper Guild, Local 120*, 647 F.2d 372, 380-81 (3rd Cir. 1981). The Third Circuit concluded that Section 301(a) jurisdiction attaches where the court will need to interpret a CBA to resolve a claim, as CBAs are governed by federal law in fulfillment of the Congressional intent of uniformity of obligation in labor contracts in or affecting interstate commerce. *Id.* at 379-80. The court held, however, that labeling a remedy as "tort" or "contract" had no bearing on jurisdiction. *Id.* at 381. The Eleventh Circuit briefly joined the Third Circuit in permitting federal tortious interference claims. *Local 472 v. Georgia Power Co.*, 684 F.2d 721, 725 (11th Cir. 1982). Subsequently, the Eleventh Circuit ruled that Section 301 claims were only permitted against contract signatories, thus de

facto refusing to permit claims for tortious interference with contract (which can only be brought against non-signatories).[1] *Xaros v. U.S. Fid. & Guar. Co.*, 820 F.2d 1176, 1181 (11th Cir. 1987). At present, only the Third Circuit permits Section 301(a) tortious interference claims.

Plaintiff contends that the Ninth Circuit cited *Wilkes-Barre* favorably in deciding that Section 301 remedies may mirror traditional tort remedies. (Opposition at 15, citing *Rozay's Transfer v. Local Freight Drivers*, 850 F.2d 1321, 1335 (9th Cir. 1988)). It is correct that the Ninth Circuit cited with approval *Wilkes-Barre*'s conclusion about the irrelevance of the tort or contract label attached to a *remedy*. *Id.* However, the permissibility of "tort-like, 'make-whole'" remedies in the Ninth Circuit does not speak to whether or not a *cause of action* for tortious interference is permitted. The Court declines to read the existence of a claim for tortious interference of contract into the Ninth Circuit's mere observation that the Third Circuit permitted a Section 301 claim for tortious interference with a CBA. *Id.*

Plaintiff contends that the Court should find a Section 301 cause of action for tortious interference because "state law claims for tortious interference that Granite Rock could bring against the IBT for its interference and inducement of an unlawful strike would likely be preempted by Section 301 ... Federal

---

[1] For instance, the first element of a California state law claim for tortious interference with contract is the existence of a valid contractual relationship between the plaintiff and a third party. *Milne Employees Ass'n v. Sun Carriers, Inc.*, 960 F.2d 1401, 1411 (9th Cir. 1991) (citing *Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 791 P.2d 587 (Cal. 1990)).

court adjudication is needed, without which there would be no forum, resulting in an 'unsettling result, in that plaintiff is left actionless...'" (Opposition at 24, citing *Wynn*, 234 F. Supp. 2d at 1120.)) However, Defendant IBT correctly contends:

> To the extent it is accurate to say there is a "gap" in the Taft-Hartley Act because it fails to provide Granite Rock with a remedy against the International, there is no basis for plaintiff to contend that the gap created by Congress was inadvertent. Congress has often chosen to create particular—but limited—bundles of rights and remedies in numerous areas of labor law ... federal law is replete with instances where Congress has injected itself into a field, preempting state law causes of action, but has also severely circumscribed the rights and remedies available under the federal statute.

(Defendant International Brotherhood of Teamsters' Reply in Support of Motion to Dismiss at 4-5, Docket Item No. 186.)

The Court follows the majority of circuits in holding that a suit for tortious interference with contract does not lie under LMRA Section 301(a).

V. CONCLUSION

The Court GRANTS Defendant IBT's Motion to Dismiss Plaintiff's Second Claim for Relief with prejudice.

Dated: October 5, 2006

/s
JAMES WARE
United States District Judge

[Dated, October 5, 2006].

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Granite Rock Company,

Plaintiff,

v.

International Brotherhood of Teamsters, Freight C, et al.,

Defendants.

NO. C 04-02767 JW

INTERLOCUTORY JUDGMENT

Pursuant to the Court's October 5, 2006 Order Granting Defendant International Brotherhood of Teamsters' Motion to Dismiss With Prejudice, judgment is entered in favor of Defendant International Brotherhood of Teamsters, against Plaintiff Granite Rock Company.

Dated: October 5, 2006

/s/
JAMES WARE
United States
District Judge

[Dated, December 13, 2006]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Granite Rock Company,	NO. C 04-02767 JW
Plaintiff,	ORDER CERTIFYING APPEAL PURSUANT TO RULE 54(b)
v.	
International Brotherhood of Teamsters, Local 287, et al.,	
Defendants.	

I. INTRODUCTION

Plaintiff Granite Rock Company ("Plaintiff") brought this suit against Defendants International Brotherhood of Teamsters ("IBT") and its Local 287 for breach of contract and tortious interference with contract under Section 301 of the Labor Management Relations Act ("LMRA").[2] On October 5, 2006, the Court granted Defendant IBT's Motion to Dismiss, holding that a claim for tortious

[2] The factual allegations of this case are provided at greater length in the Court's October 5, 2006 Order Granting Defendant International Brotherhood of Teamsters' Motion to Dismiss With Prejudice (hereafter, "Order," Docket Item No. 192.)

interference with contract against a non-signatory to the contract does not lie under Section 301 of the LMRA. Before the Court is Plaintiff's Motion for Certification. Plaintiff requests the Court to certify its appeal of the Order either as a final judgment that is directly and immediately appealable under Federal Rule of Civil Procedure 54(b) or as an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The Court found the motion appropriate for submission without oral arguments. *See* Civ. L.R. 7-1(b). Based on the papers submitted to date, the Court GRANTS Plaintiff's Motion for Certification.

II. STANDARDS

In a multi-claim or multi-party action, the district court may direct entry of a final judgment for purposes of appeal if (1) the court expressly determines that there is no just reason for delay and (2) the court expressly directs the entry of judgment. Fed. R. Civ. P. 54(b). The judgment must apply to one or more, but fewer than all of the claims or parties in the case. *Id.* In applying Rule 54(b), the district court must "strike a balance between the undesirability of more than one appeal in a single action and the need for making review available in multiple-party or multiple-claim situations at a time that best serves the need of the litigants." *Good v. Ohio Edison Co.*, 104 F.3d 93, 95 (6th Cir. 1997). To determine whether certification is proper, appellate courts consider (1) the district court's evaluation of the factors favoring a Rule 54(b) judgment, including the interrelationship of the claims and (2) the trial court's assessment of the equities, including delay or prejudice to any party. *Gregorian v. Izvestia*, 871 F.2d 1515, 1519 (9th Cir. 1989).

The Ninth Circuit traditionally took a restrictive view of the circumstances under which Rule 54(b) certification was appropriate. *See Morrison-Knudsen Co. v. Archer*, 655 F.2d 962, 965 (9th Cir. 1981). However, the Ninth Circuit has more recently held, "The present trend is towards greater deference to a district court's decision to certify under Rule 54(b). *Morrison-Knudsen* . . . is an outdated and overly restrictive view of the appropriateness of Rule 54(b) certification." *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 798 (9th Cir. 1991). Rather, the present approach is a "pragmatic" approach that "focus[es] on severability and efficient judicial administration." *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1525 (9th Cir. 1987).

III. DISCUSSION

A. Severability

Plaintiff contends that certification is proper because the issue to be appealed is severable from the remainder of the case. (Plaintiff's Motion for Certification Under F.R.C.P. 54(b) or, in the Alternative, 28 U.S.C. § 1292(b) of the Court's October 5, 2006 Order Granting Defendant International Brotherhood of Teamsters' Motion to Dismiss with Prejudice at 4-6, hereafter, "Motion," Docket Item No. 196.) Severability exists for Rule 54(b) purposes when the claims to be certified can be separated both factually and legally from the remaining matters. *Continental Airlines, Inc.*, 819 F.2d at 1525. Here, legal severability exists because the issue for appeal concerns whether a plaintiff can assert a claim for tortious interference with contract against a non-signatory to the contract. In contrast, the only remaining issue pending before the Court is

whether a valid contract was formed between the two parties to the putative contract, Plaintiff and Local 287. Moreover, factual severability exists because different allegations underlie Plaintiff's claims against IBT and Local 287. Plaintiff alleges that Local 287 entered into and subsequently breached a valid contract. In contrast, Plaintiff alleges that IBT "engaged in acts that were intended to induce, support, and encourage a strike that breached the collective bargaining agreement between Granite Rock and Local 287." (Motion at 5.) The Court finds that the issue to be appealed is legally and factually severable from the remainder of the case still pending before the Court.

B. Mootness and Judicial Economy

IBT's principal argument against certification is that Plaintiff's claim for tortious interference against it may be rendered moot. (International Brotherhood of Teamsters' Opposition to Plaintiff's Motion for Certification Under F.R.C.P. 54(b) or, in the Alternative, 28 U.S.C. § 1292(b), of the Court's October 5, 2006 Order Granting Defendant International Brotherhood of Teamsters' Motion to Dismiss with Prejudice at 6-9, hereafter, "Opposition," Docket Item No. 207.) In the Ninth Circuit, certification is appropriate "even if subsequent trial proceedings might obviate the need for an appeal," where "eliminating issues and parties from a case justifies the entry of final judgment on a claim." *Cadillac Fairview/Cal., Inc. v. United States*, 41 F.3d 562 (9th Cir. 1994)

If a jury finds that a contract was not formed between Plaintiff and Local 287, Plaintiff will be bound by that determination and will be unable to

maintain a claim against IBT for tortious interference with contract, rendering its appeal moot. Conversely, if the jury finds that a contract was formed between Plaintiff and Local 287, Plaintiff will then have to appeal the Court's October 2006 Order which held that a Section 301 claim for tortious interference with contract does not lie. If Plaintiff is successful, Plaintiff will have to return to district court to litigate its tortious interference with contract claim. IBT will then likely argue that it is not bound by the jury's previous determination that a contract existed, and Plaintiff may be forced to relitigate that issue. Under this scenario, not only would Plaintiff suffer prejudice due to lengthy delay, but the interest of judicial economy would not be furthered.

Trial on the question of whether Plaintiff and Local 287 formed a valid contract is presently scheduled for April 24, 2007. (*See* Docket Item No. 209.) If Plaintiff prevails at trial on the question of whether a collective bargaining agreement existed, it will be well-situated to pursue its claim against IBT, as the seminal issue will already have been presented to the Ninth Circuit on appeal. Similarly, IBT will benefit from a speedier resolution of the issue on appeal. If, conversely, Plaintiff loses at trial, the appeal can be withdrawn. The Court finds that the best means to balance the parties' interests is to grant Plaintiff's motion for certification pursuant to Rule 54(b), but to decline to stay the trial between

Plaintiff and Local 287 on the question of whether there is a contract.[3]

IV. CONCLUSION

The Court GRANTS Plaintiff's Motion for Certification.

Dated: December 13, 2006

/s/

JAMES WARE
United States
District Judge

[3] Since the Court finds Rule 54(b) certification appropriate, the Court need not reach the question of whether certification under 28 U.S.C. § 1292(b) is appropriate.

[Dated, January 17, 2007].

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

GRANITE ROCK COMPANY,

Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, FREIGHT, CONSTRUCTION, GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 287; and INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Defendants.

Case No. 04 2767 JW

AMENDED FINAL JUDGMENT AND CERTIFICATE OF APPEALABILITY

Pursuant to the Court's December 13, 2006 Order Certifying Appeal Pursuant to Rule 54(b) (see Docket Item No. 212), the Court enters final judgment in favor of Defendant International Brotherhood of Teamster, and against Plaintiff Granite Rock Company.

For the reasons stated in the Court's December 13, 2006 Order, the Court has expressly determined there is no just reason for delay. Therefore, the Court certifies for appeal the case between Plaintiff

Granite Rock and Defendant International Brotherhood of Teamsters.

Dated: January 12, 2007

/s/
The Honorable James Ware
United States District Judge

[Dated, February 16, 2007].

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Granite Rock Company, Plaintiff, v. Teamsters Local 287, Defendant.	NO. C 04-02767 JW **ORDER DENYING LABOR UNION'S MOTION TO COMPEL ARBITRATION OF BIFURCATED ISSUE OF WHETHER THE COLLECTIVE BARGAINING AGREEMENT WAS RATIFIED**

I. INTRODUCTION

This case involves a dispute between a plaintiff-employer ("Granite Rock") and a defendant labor union ("Local 287") over Local 287's alleged refusal to order bargaining unit employees to return to work after Local 287's and Granite Rock's representatives negotiated a new collective bargaining agreement ("CBA") on July 2, 2004. Local 287 contends that its refusal was permissible because the new CBA was not ratified by its members at a time relevant to the litigation. Granite Rock alleges that the CBA was ratified on July 2, 2004, and the employees'

continued strike past that date represents a breach of the CBA.

Granite Rock brought this civil action against Local 287 for breach of contract. Due to the putative CBA's arbitration clause, the Court established a bifurcated proceeding: (1) the Court will determine whether the CBA was ratified and (2) if yes, the Court will compel arbitration of Granite Rock's damages claim. Although Local 287 has repeatedly requested arbitration, it maintains the CBA was not ratified.

Presently before the Court is Local 287's current Motion to Compel Arbitration, which cites additional authority to compel arbitration. This Order finally resolves the issue of whether the Court or an arbitrator must decide the threshold ratification issue.[4] The Court conducted a hearing on January 29, 2007. Based on the papers submitted to date and the oral arguments of counsel, the Court finds the additional authorities cited by Local 287 unpersuasive. The Court DENIES Local 287's Motion to Compel Arbitration pending the Court's ruling on the issue of whether the CBA was ratified at a time relevant to this litigation.

---

[4] The reasoning in this Order is based on the following premise. Neither party advances, nor does the language of the prior (1999-2004) CBA seem to support that the CBA and its included arbitration provision applied on or after July 2, 2004. (*See* First Amended Complaint Ex. A, Docket Item No. 5.)

II. BACKGROUND

The parties do not dispute the following:

Granite Rock supplies ready mixed concrete for commercial use. Its bargaining unit employees are represented by the International Brotherhood of Teamsters, Local 287. Between March 1, 1999 and April 30, 2004, Granite Rock and Local 287 were parties to a CBA. In anticipation of the CBA's expiration, Granite Rock and Local 287 commenced negotiations on a new CBA. While negotiations were in progress, the earlier CBA expired, and the bargaining unit employees went on strike. In the early morning hours of July 2, 2004, representatives for both sides agreed on the terms of a new CBA. A Local 287's representative stated that he would present the proposed CBA to the bargaining unit employees.

Granite Rock alleges the following:

> The bargaining unit employees voted to approve the new CBA on July 2, 2004. (Third Amended Complaint for Damages 20, hereafter, "TAC," Docket Item No. 164.) Later that day, Local 287's representative contacted Granite Rock to state that the new CBA was ratified. *Id.* On July 6, 2004, Local 287 told Granite Rock that its members would not return to work until Granite Rock signed a Back-to-Work Agreement that guaranteed amnesty for Local 287's members and for Granite Rock's employees in facilities at three other counties to whom separate CBAs

> applied. (TAC 24.) On August 22, 2004, the bargaining unit employees again approved the new CBA. (TAC 27.) The strike continued in violation of the CBA's terms until September 13, 2004. (TAC 28.)

Local 287 alleges the following:

> After Local 287's representative stated that he would present the tentative CBA to the bargaining unit employees, the representatives continued with their meeting. (Answer of Defendant Teamsters Local 287 to Second Amended Complaint 7, hereafter, "Answer," Docket Item No. 111.) Before the meeting was concluded, the representatives agreed that a "back-to-work" agreement would be negotiated; Granite Rock presented a draft of a "back-to-work" proposal; Local 287's representative rejected the proposal and stated that Local 287 would provide a counterproposal later that day; and Local 287's representatives made clear that there would be no ratification vote by the strikers until the parties concluded a "back-to-work" agreement. *Id.*

On July 9, 2004, Granite Rock filed this damages action pursuant to the Labor Management Relations Act, 29 U.S.C. § 185(a), alleging that Local 287's members' refusal to return to work was a breach of the new CBA. (*See* Docket Item No. 1.) Local 287 pleads as affirmative defenses that (1) the new CBA

was not ratified by Local 287's members at any time relevant to this action and (2) its alleged conduct for which Granite Rock seeks damages—striking in breach of a no-strike clause—presents a dispute subject to the grievance and arbitration provisions of the CBA presently in effect between the parties, making the Court's assertion of jurisdiction inappropriate. (Answer at 4-5.) Presently before the Court is Local 287's Motion to Compel Arbitration.

III. DISCUSSION

The Court previously bifurcated this case. (See Order Granting Defendant's Motion for Partial Summary Judgment and Denying Defendant's Motion to Strike Plaintiff's Jury Demand, Docket Item No. 83.) The Court held that (1) it would first decide the issue of contract ratification and (2) it would refer any remaining issues to arbitration. *Id.* Granite Rock demanded a jury trial on the issue of contract ratification.

Local 287 now moves the Court to refer even the threshold issue of contract ratification to arbitration. Local 287 contends that (1) since Granite Rock's position is that the CBA was ratified and (2) the putative CBA undisputedly contains an arbitration agreement that covers allegedly unlawful strikes, (3) whether ratification occurred on July 2, 2004 must also be determined by an arbitrator. (Notice of Motion and Motion to Compel Arbitration in Light of New Ninth Circuit En Banc Opinion at 2-4, hereafter, "Motion," Docket Item No. 213.) Granite Rock opposes referral of the ratification question to arbitration, contending that Local 287's claim of nonratification is tantamount to a claim that there was no CBA in existence. Granite Rock contends

that case law mandates that a court must decide, under these circumstances, whether a contract existed between the parties. (Plaintiff's Opposition to Defendant's Motion to Compel Arbitration in Light of New Ninth Circuit En Banc Opinion; Request for Sanctions at 6-7, hereafter, "Opposition," Docket Item No. 219.) Each of the parties cite case law not previously brought to the Court's attention. The discussion below confirms the Court's decision to proceed with the bifurcated trial of the ratification issue.

A. When Order to Compel Arbitration May Be Issued

The Supreme Court has articulated two fundamental principles of arbitrability within the labor context. First, since arbitration is a function of contract law, a court may only compel arbitration of a dispute which the parties have previously agreed to arbitrate. *AT&T Technologies, Inc. v. Comm. Workers*, 475 U.S. 643, 648 (1986). Second, whether a CBA mandates arbitration of a particular grievance is a judicial determination. *Id.* at 649. Thus, if the parties dispute the existence of an agreement to arbitrate, the court resolves this dispute before referring remaining questions to arbitration. The Court considers Local 287's claim that the CBA was not ratified is equivalent to a claim that there is no agreement to arbitrate.

B. Effect of Labor Union's Charter

"Ratification" is a term with multiple legal meanings. First, ratification describes the act of a principal that gives legal effect to an act of an unauthorized agent. *See Quality Foods, Inc. v.*

Holloway Assoc. Prof. Eng'rs & Land Surveyors, Inc., 852 N.E. 2d 27, 33 (2006). Second, ratification refers to an entity's consent to be bound by an act or position of an authorized representative. *Canadian Lumber Trade Alliance v. United States*, 425 F. Supp. 2d 1321, 1362 (2006).

Where a labor union's charter requires a ratification vote, a CBA is not binding on the union until ratified. *See, e.g., N.L.R.B. v. Holly-General Co.*, 305 F.2d 670, 671 n.2 (9th Cir. 1962). Local 287 is a local of the International Brotherhood of Teamsters ("International"). The Constitution of the International provides as follows:

> Agreements shall be accepted by a majority vote of those members involved in negotiations and voting, or a majority of such members shall direct further negotiations before a final vote on the employer's offer is taken, as directed by the Local Union Executive Board. During negotiations, the Local Union Executive Board may order a secret ballot strike vote to be taken and when, in the judgment of the Local Union Executive Board, an employer has made a final offer of settlement, such offer must be submitted to the involved membership for secret ballot vote as hereinafter provided. When the final offer has been rejected in accordance with this Section, it shall constitute authorization for a strike at such time and under such conditions as

the Local Union Executive Board may determine.

Int'l Teamsters Const., Art. XII, § 2. Local 287's bylaws provide as follows:

> Whenever a collective bargaining agreement is about to be negotiated . . . the principal executive officer shall call a meeting at which the membership shall determine and authorize the bargaining demands to be made. The Local Union Executive Board shall determine whether such meeting shall be limited to the members in a particular division, craft or place of employment.
>
> Ratification of agreements or amendments shall be subject to vote in the same manner as provided in connection with bargaining as set forth in Section 25(a) in the case of area-wide, conference-wide or national agreements in accordance with the Constitution and rules adopted by such bargaining group, except where the General Executive Board has directed the Local Union to refrain from executing such agreement, no proposed agreement shall be considered ratified by any vote until and unless it is specifically approved by the General Executive Board.
>
> Where a final contract proposal has been reduced to writing at the time it is

> to be submitted for vote, copies of the written proposal shall be made available to the affected membership.

The International's Constitution and Local 287's bylaws permit the interpretation that Local 287's membership must ratify a CBA before it is binding on Local 287. Granite Rock does not contend otherwise. It simply disputes Local 287's claim that the CBA was not ratified on July 2, 2004.

C. Effect of Labor Union's Claim That CBA Was Not Ratified on Date of Alleged Breach

The heart of the issue is whether the Court or an arbitrator must determine whether the CBA was ratified. The parties cite a series of cases addressing the division of decision-making labor between courts and arbitrators. Pursuant to the holding of *Three Valleys Municipal Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136 (9th Cir. 1991), the Court finds that it must decide the ratification issue before it refers the remainder of the case to arbitration.

1. *Three Valleys*

In *Three Valleys*, several public entities opened securities accounts with defendant. 925 F.2d at 1137. On opening of a securities account, defendant required the account holder to sign a "Client Agreement," which contained an arbitration clause. *Id.* at 1138. An individual signed client agreements on behalf of the public entities. *Id.* The public entities filed suit in federal court alleging that defendant's wrongful conduct had caused them substantial investment losses. *Id.* Defendant moved to compel arbitration, to which the public entities

objected on the grounds that the client agreements were void, as the signatory-individual did not have the authority to bind them. *Id.*

The public entities filed suit in federal court, alleging that defendant's wrongful conduct had caused them substantial investment losses. *Id.* Defendant moved to compel arbitration. *Id.* The public entities objected to arbitration, contending, inter alia, that the individual who signed the client agreement did not have the authority to bind them. *Id.* The district court ruled that whether or not the signatory had the ability to bind the public entities should be submitted to arbitration, but declined to order arbitration of all the claims. *Id.* The matter came to the Ninth Circuit on cross-appeals. *Id.*

The Ninth Circuit held that the district court should have determined the issue of whether the signatory had the authority to bind the public entities:

> If the dispute is within the scope of an arbitration agreement, an arbitrator may properly decide whether a contract is "voidable" because the parties have agreed to arbitrate the dispute. But, because an "arbitrator's jurisdiction is rooted in the agreement of the parties," a party who contests the making of a contract containing an arbitration provision cannot be compelled to arbitrate the threshold issue of the existence of an agreement to arbitrate. Only a court can make that decision.

Id. at 1140-41 (internal citations omitted). The court distinguished two earlier cases addressing the

division of decision-making power between courts and arbitrators: *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) and *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404 (9th Cir. 1989).

i. ***Prima Paint***

In *Prima Paint*, plaintiff contracted to purchase defendant's paint business. 388 U.S. at 397. Approximately three weeks later, the parties signed a consulting agreement for defendant to provide consulting services to plaintiff in connection with plaintiff's business operations. *Id.* The consulting agreement provided for arbitration of "[a]ny controversy or claim arising out of or relating to this Agreement." *Id.* at 398. When plaintiff's first payment under the consulting agreement became due, it placed the payment in escrow, accusing the defendant of fraudulent inducement of contract. *Id.* Defendant responded by serving a "notice of intent to arbitrate." *Id.* Plaintiff filed a federal civil action seeking rescission of the consulting agreement on the basis of fraudulent inducement and an injunction against defendant from proceeding with the arbitration. *Id.* at 399. Defendant cross-moved to stay the court action pending arbitration of plaintiff's fraudulent inducement claim. *Id.* The lower courts found in favor of immediate arbitration.[5] *Id.* at 399-400.

The Supreme Court affirmed the decision to compel arbitration for two reasons. First, the language of

---

[5] These rulings were based on the United States Arbitration Act of 1925. *Id.* at 400. In this case, the Federal Arbitration Act applies. There is no difference between the provisions relevant to this discussion.

the arbitration clause was sufficiently broad to encompass the plaintiff's fraudulent inducement claim. *Id.* at 406. Second, the plaintiff, who was the party resisting arbitration, claimed that the entire contract, rather than the arbitration clause specifically, was fraudulently induced. *Id.* at 403-04. The Supreme Court distinguished fraudulent inducement claims specifically directed towards the arbitration clause, holding that a federal court could adjudicate those. *Id.*

The Ninth Circuit in *Three Valleys* read the holding of *Prima Paint* as limited to challenges seeking to avoid or rescind a contract. The court held that *Prima Paint* did not apply to a challenge to the existence of a contract to which a party claims never to have agreed:

> A contrary rule would lead to untenable results. Party A could forge party B's name to a contract and compel party B to arbitrate the question of the genuineness of its signature. Similarly, any citizen of Los Angeles could sign a contract on behalf of the city and Los Angeles would be required to submit to an arbitrator the question of whether it was bound to the contract, even if its charter prevented it from engaging in any arbitration.

925 F.2d at 1140. The *Three Valleys* court characterized its issue — whether a signatory had the authority to bind its putative principal — as a challenge to the very existence of a contract. As such, the issue was for the court to decide. *Id.* at 1144.

ii. *Teledyne*

In *Teledyne*, the plaintiff was defendant's exclusive United States distributor of hydraulic breakers pursuant to a signed agreement. 892 F.2d at 1406. After the agreement ended, the parties began negotiating a new agreement. *Id.* Negotiations culminated with both parties' representatives signing an exclusive distributorship agreement in April 1986. *Id.* The agreement's front page stated, "DRAFT (to be finalized by [defendant's] legal department)." *Id.* Neither party took further action towards finalizing the agreement. *Id.* The draft agreement provided that any dispute between the parties concerning the agreement would be resolved by arbitration. *Id.*

In 1987, plaintiff filed a civil action, which was removed to federal court.[6] *Id.* at 1407-1410. Plaintiff claimed that during the course of negotiating the distributorship agreement, defendant was secretly negotiating for the sale of its hydraulic breaker division to another company, and it ultimately did sell the division. *Id.* at 1406. Defendant claimed that a "draft agreement" could not be the basis for a breach of contract claim. Defendant nonetheless moved to dismiss the lawsuit pursuant to the Federal Arbitration Act, contending that the dispute was subject to the distribution agreement's arbitration clause. Plaintiff opposed dismissal, pointing to defendant's contention that no valid contract existed. *Id.* at 1410. The district court

---

[6] Although there were subject matter jurisdiction issues considered on appeal, those issues do not impact the relevance of *Teledyne* court's analysis of the arbitration issue to this case.

granted defendant's motion to dismiss, and plaintiff appealed.

The Ninth Circuit held that dismissal of plaintiff's claims pursuant to the Federal Arbitration Act was proper. The alternative, according to the court, would produce an absurd result: "The district court could grant [plaintiff] relief on the contract only if it finds that the 1986 Draft was finalized. But if the 1986 draft was final and valid, the arbitration provision would be valid as well since it has not been the subject of any independent challenge. And if the arbitration provision was valid, [plaintiff's] claims would not belong in federal court in the first place." *Id.* Thus, the Ninth Circuit held, "The federal courts have avoided such absurdities by requiring that cases be submitted to arbitration unless there is a challenge to the arbitration provision which is separate and distinct from any challenge to the underlying contract. The teaching of *Prima Paint* is that a federal court must not remove from the arbitrator's consideration a substantive challenge to a contract unless there has been an independent challenge to the making of the arbitration clause itself." *Id.* As to defendant, the court held, "[Defendant] has argued that the 1986 Draft was never finalized. It has attacked the contract as a whole without making an 'independent challenge' to the arbitration provision. It has thus not waived its right to have an arbitrator determine whether the 1986 Draft was finalized." *Id.*

A broad reading of *Teledyne* is that any contract-related issue which is not an independent challenge to the arbitration clause itself is arbitrable. This reading would mean that the signatory issue in

Three Valleys was arbitrable. The *Three Valleys* court rejected this possibility, holding that Teledyne should not be read broadly enough to delegate all contract issues to the arbitrator. 925 F.2d at 1141-42. The court found that *Teledyne* was a "rare case." That is, in *Teledyne*, the plaintiff implicitly asserted by suing for breach of contract that the underlying contract (which contained an arbitration clause) was valid. The *Teledyne* plaintiff also did not make an independent challenge to the contract's arbitration clause. Thus, the plaintiff lacked a ground to repudiate its prior agreement to arbitrate, and the court would not allow it to circumvent arbitration by bringing its claims in federal court. In contrast, the *Three Valleys* plaintiffs denied the existence of the contracts containing the arbitration provisions, thus implicitly contesting any agreement to arbitrate within the contracts. *Id.* The *Three Valleys* court concluded, "To require the plaintiffs to arbitrate where they deny that they entered into the contracts would be inconsistent with the 'first principle' of arbitration that 'a party cannot be required to submit [to arbitration] any dispute which he has not agreed so to submit." *Id.* at 1142 (quoting *AT&T Technologies*, 475 U.S. at 648.)

2. The *Nagrampa* Case

The parties also dispute the effect of *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257 (9th Cir. 1996). Plaintiff, a franchisee of defendant, signed an agreement requiring arbitration of any dispute that arose out of or in relation to the agreement. 469 F.3d at 1265. She unilaterally terminated the franchise agreement after two years, and defendant initiated arbitration to recover fees owed. *Id.* Rather than

participate in arbitration, plaintiff filed suit in state court alleging, *inter alia*, that the franchise agreement's arbitration provision was invalid as an unconscionable contract of adhesion pursuant to the California Consumer Legal Remedies Act. Plaintiff's complaint did not seek to have the entire franchise agreement invalidated or declared unconscionable. *Id.* at 1266.

The Ninth Circuit, *en banc*, reaffirmed the well-established principle that the arbitrability of a particular dispute is a threshold issue to be decided by the courts. *Id.* at 1268 (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002); *AT&T Techs., Inc. v. Comm. Workers of Am.*, 475 U.S. 643, 649 (1986)). Federal law provides that arbitration agreements are valid, irrevocable, and enforceable, barring legal or equitable grounds for revocation. *Id.* (citing 9 U.S.C. § 2.) A court may revoke an arbitration agreement for, inter alia, fraud, duress, or unconscionability. *Id.* (citing *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

The *Nagrampa* court followed the Supreme Court's long-established dichotomy with respect to arbitration agreements, which was recently reaffirmed in *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S.Ct. 1204 (2006). In *Buckeye*, the Court divided challenges to arbitration agreements into two categories: (1) challenges to the validity of an agreement to arbitrate and (2) challenges to the contract as a whole, whether a challenge to the entire agreement or a challenge to a portion of the contract that renders the entire contract invalid. *Id.* at 1208. The Court held that the courts resolve challenges specific to the validity of an arbitration

clause, but that arbitrators consider challenges to the validity of entire contracts, where the contract contains an arbitration clause.

The Ninth Circuit, then, applied the reasoning of *Buckeye* to unconscionable agreements in *Nagrampa*:

> [W]hen the crux of the complaint challenges the validity or enforceability of the agreement containing the arbitration provision, then the question of whether the agreement, as a whole, is unconscionable must be referred to the arbitrator. When the crux of the complaint is not the invalidity of the contract as a whole, but rather the arbitration provision itself, then the federal courts must decide whether the arbitration provision is invalid and unenforceable under 9 U.S.C. § 2 of the FAA.

469 F.3d at 1263.

Thus, *Nagrampa* considers whether a court or an arbitrator should decide a challenge to the enforceability of a contract that was undisputedly formed. It does not control as to a scenario where a contracting party contends that, due to lack of ratification, it did not enter into the contract in the first place.

3. Applicability to This Case

The current positions of the parties are curious. Local 287 contends that the CBA was not ratified

and thus, was not in force at the time of the alleged breach. However, Local 287 is willing to waive its right to a judicial determination of the ratification issue and submit the case to arbitration. (Motion at 3.) Granite Rock contends that the CBA was ratified, which implicitly means that the arbitration clause was in effect on the date of the alleged breach. However, Granite Rock requests the Court, not an arbitrator, to determine whether the CBA was ratified. (Opposition at 6-7.)

The caselaw establishes the following framework for arbitrability determinations in the Ninth Circuit. If the parties dispute the threshold issue of contract formation, *AT&T* and *Three Valleys* stand for the proposition that the court must determine whether a contract was formed before it can compel the parties to arbitrate the dispute. If, alternatively, the parties had a signed agreement and the signatories had undisputed authority to bind the parties, but the parties now contest the validity or enforceability of part or all of that agreement, *Nagrampa, Teledyne, Prima Paint* and *Buckley* establish the following dichotomous framework. Challenges to the contract as a whole — e.g. unconscionability or fraudulent inducement of contract — are determined by an arbitrator. On the other hand, challenges specifically to the agreement's arbitration clause are resolved by the court. This dichotomy vindicates the principle described in *AT&T*: no party may be compelled to arbitrate a disagreement unless it previously agreed to arbitration.

Here, Local 287 contends that the CBA was never ratified by its membership. The International's charter and Local 287's bylaws potentially state that

a CBA is not binding on Local 287 until it is ratified by a vote of Local 287's members (an issue on which the Court will entertain argument at trial). Thus, Local 287's contention is, in essence, that the parties never formed a CBA.[7]

Since the resolution of the ratification issue is inextricably tied to the existence of any contract to arbitrate, the Court reaffirms its decision to decide this question in the first stage of this bifurcated proceeding.

D. Request for Sanctions

Granite Rock moves the Court to sanction Local 287 for making this motion in light of the Court's denial of a previous motion that raised the same issue. (Opposition at 7-9.) This motion implicates the same issues previously addressed by the Court in an earlier motion made by Local 287. (*See* Docket Item Nos. 48, 83.) However, this motion directed the Court's attention to different authorities than those previously presented for consideration. The issue of the arbitrability of a claim that a contract was not ratified is a difficult legal issue worthy of careful judicial review. The Court finds that Local 287's motion was made in good faith. Granite Rock's motion for sanctions is denied.

---

[7] This case is distinguishable from *Teledyne*, in which the parties undisputedly signed a draft agreement which merely needed finalizing by the defendant's legal department. 892 F.2d at 1406. Indeed, there was evidence in *Teledyne* that the defendant (the party seeking to avoid the contract) had regarded the contract as creating enforceable rights and obligations. *Id.* In this case, there is no evidence that Local 287 signed the putative CBA, whether by ratification of its members or otherwise.

IV. CONCLUSION

The Court DENIES Defendant's Motion to Compel Arbitration. The trial in this case shall proceed as previously scheduled. The parties shall appear for a Final Pretrial Conference on April 9, 2007 at 3 p.m.

Dated: February 16, 2007

/s/
JAMES WARE
United States District Judge

[Dated, May 2, 2007]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA
SAN JOSE DIVISION

Granite Rock Company, No. C 04-02767 JW

Plaintiff, CLOSING INSTRUCTIONS

v.

Teamsters Local 287,

Defendant.

Members of the jury, now that you have heard all the evidence, it is my duty to instruct you on the law which applies to this case. Copies of these instructions have been made available for you to consult.

As I have instructed you, it is your duty to find the facts from all the evidence in the case. To those facts, you must apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. In deciding the case, you must not be influenced by any prejudices or sympathies. That means that you must decide the case solely on the evidence before you and according to the law. You will recall that you took an oath promising to do so at the beginning of the case.

You must follow all of my instructions. You must not single out some and ignore others; they are all important.

The evidence from which you are to base your verdict consists of the sworn testimony of witnesses, both on direct and cross-examination, regardless of who called the witness; the exhibits which have been received into evidence; and any facts to which the lawyers have agreed or stipulated.

If there is a conflict between the testimony of one or more witnesses and that of other witnesses, you must decide which testimony to believe and which testimony not to believe. You may disbelieve all or any part of any witness's testimony. In making that decision, you should take into account a number of factors including the following:

Was the witness able to see, or hear, or know the things about which that witness testified?

How well was the witness able to recall and describe those things?

What was the witness' manner while testifying?

Did the witness have an interest in the outcome of this case or any bias or prejudice concerning any party or any matter involved in the case?

How reasonable was the witness' testimony considered in light of all the evidence in the case?

Was the witness's testimony contradicted by what that witness said or did at another time, or by the testimony of other witnesses, or by other evidence?

In deciding whether or not to believe a witness, keep in mind that people sometimes forget things. You need to consider whether a contradiction is an innocent lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or with only a small detail.

The persuasiveness of the evidence presented by each side does not necessarily depend on the number of witnesses testifying on one side or the other. You must consider all the evidence in the case, and you may decide that the testimony of a smaller number of witnesses on one side has greater persuasiveness than that of a larger number on the other side.

During the trial, you heard testimony read from a deposition. As I instructed you during the trial, a deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath to tell the truth and lawyers for each party may ask questions. The questions and answers are recorded.

Deposition testimony is entitled to the same consideration and is to be judged, insofar as possible, in the same way as testimony given during the trial.

You have heard testimony from individuals who, because of education or experience, have become experts in a particular field. The law permits experts to state opinions about matters in the field of their expertise and they are permitted to state the reasons for those opinions.

Expert opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves. In deciding whether to believe an expert's testimony,

you should consider the expert's training and experience; the facts the expert relied on; and the reasons for the expert's opinion.

The verdict form will contain a series of questions about what happened between the parties in July 2004. Each question will call for a "Yes" or "No" answer. With respect to each question, Plaintiff Granite Rock has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove that each question should be answered "Yes."

You will recall, at the beginning of the case, I told you that a plaintiff has the burden of proving the case by a preponderance of the evidence. That means that a plaintiff has to produce evidence which, considered in the light of all the facts, leads you to believe that what the plaintiff claims is more likely true than not. To put it differently, if you were to give evidence which you find persuasive more weight than evidence that you do not find persuasive; and if you put the evidence supporting what Granite Rock contends happened on one side of a scale and you put what Local 287 contends happened on the opposite side of the scale, the evidence supporting Granite Rock would have to make the scales tip on Granite Rock's side of the scales. If you evaluate the evidence and you find that the evidence is evenly balanced between the two sides, your verdict must be in favor of Local 287. If you evaluate the evidence and you decide that what Granite Rock claims is more likely true than not true, in other words if the scales tip on Granite Rock's side—even slightly, then your verdict should be rendered in favor of Granite Rock.

Evidence may be direct or circumstantial. Direct evidence is testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one can find another fact. You are to consider both direct and circumstantial evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

During the trial, I ordered that evidence be stricken from the record and that you disregard or ignore the evidence. That means that when you are deciding the case, you must not consider the evidence which I told you to disregard. There were instances during the case when I admitted evidence for a limited purpose and I instructed you to consider it only for that limited purpose. During your deliberations you may only consider such evidence for that limited purpose.

DISPUTED FACTS

The disputed facts in this case are (1) whether or not a proposed new collective bargaining agreement was ratified by members of Local 287; and (2) whether or not a representative of Local 287 notified a representative of Granite Rock that the proposed new collective bargaining agreement had been ratified.

STIPULATED FACTS

In a 21-paragraph document, the parties have stipulated to facts. You have been provided with a copy of the stipulation. You must regard those facts as established. I will refer to some of those

stipulated facts during the course of my instructions. The fact that I refer to some stipulated facts and not others is no indication that I regard any of the facts as more important. I will refer to the stipulated facts solely to instruct you on the law which you must follow in reaching your verdict.

AGENCY

In Paragraphs 6 and 7 of the stipulated facts, the parties have stipulated that George Netto is, and at all relevant times was, a Business Agent of Defendant Local 287, with authority to bind Defendant 287 with respect to collective bargaining agreements. Under the law, Local 287 is what is called "a principal" and Mr. Netto is "an agent." The "principal" is the person or entity who retains another, the "agent", to act on behalf of the principal and under the principal's directions and control such that the acts of the agent are binding on the principal. A labor union may appoint a business agent to negotiate a collective bargaining agreement and may give the agent authority to bind the labor union without further approval of the members of the union. Alternatively, the labor union may require that the agent present any proposed collective bargaining agreement to the members of the union to vote on, and authorize the agent to bind the labor union only if a majority of the union members vote in favor of the proposed agreement.

RATIFICATION

Paragraph 16 of the stipulated facts states: "The parties agreed that the collective bargaining agreement, for which a Tentative Agreement was reached, was conditioned on a ratification vote of the

San Jose Concrete bargaining unit members at 9:00 a.m., on July 2, 2004, before the parties would be required to fulfill its terms."

In the context of this case, "ratification vote" means a vote by the members of Local 287 approving the terms of the Tentative Agreement.

Under the labor laws of the United States, once an agreement is reached between an employer and a bargaining agent for a labor union, who has the authority to enter into a binding agreement, the labor union is obligated to execute a contract embodying that agreement. The labor laws of the United States do not require agents to obtain employee-ratification of a proposed collective bargaining before a binding agreement is reached. However, a labor union can restrict the authority of its bargaining agent and require that the agent present any proposed collective bargaining agreement for membership ratification. In addition, the parties who are negotiating a collective bargaining agreement are free to agree that ratification must take place before the parties are bound to the proposed agreement. Here, you must accept as fact that the representatives of Granite Rock and the representatives of Local 287 agreed that a vote of the members of Local 287 who worked at the San Jose Concrete facility ratifying the Tentative Agreement had to take place before the parties would be required to fulfill the terms of the Tentative Agreement.

On your verdict form, you will be asked to indicate if Granite Rock proved by a preponderance of the evidence that the members of Local 287 who worked

at the San Jose Concrete facility voted to ratify the Tentative Agreement on July 2, 2004.

Ratification in the context of this case means a majority voting to approve the entire Tentative Agreement.

NOTIFICATION

Under the labor laws of the United States, whenever a labor organization, through its authorized representative, notifies an employer that a tentative agreement has been ratified by the employees, that notice signifies acceptance of the rights and duties arising under the agreement, and in turn, a duty aries to execute a written contract embodying the terms of the tentative agreement. Notice of ratification can be given verbally. No particular words are required so long as what is said is that the employees approved the tentative agreement or words to that effect.

You have heard evidence that after the meeting on July 2, 2004, there may or may not have been contacts between representatives of Granite Rock and Local 287. Whether there was contact between the representatives and, if so, what was said, are questions of fact for you to decide. On your verdict form, you will be asked to indicate if you find that Granite Rock proved by a preponderance of the evidence that after the July 2, 2004 meeting of Local 287, a duly authorized representative of Local 287 notified a duly authorized representative of Granite Rock that the Tentative Agreement had been ratified by the employees.

ARGUMENT OF COUNSEL

I will now permit counsel for the parties to make their closing arguments. Counsel for plaintiffs will make a closing argument, followed by the closing argument by counsel for defendants. If he does not use all of his allotted time, counsel for plaintiff will be permitted a brief rebuttal argument and then I will have some brief additional instructions for you with respect to the conduct of your deliberations. Remember, statements of the attorneys are not evidence.

[FOLLOWING CLOSING ARGUMENT]
DUTY TO DELIBERATE

When you retire, you should elect one member of the jury as your presiding juror. That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you

can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

During the course of your deliberations you may take rest breaks or lunch breaks as you wish. Since we will be standing by pending your deliberations, please send us a note as to what your schedule will be. During any break, do not deliberate further upon the case. Cease all deliberations until your foreperson has brought you back into session with all of you present.

RETURN OF VERDICT

After you have reached unanimous agreement on a verdict, your presiding juror will fill in the form that will be given to you, sign and date it and advise the marshal or clerk of court outside your door that you are ready to return to the courtroom.

COMMUNICATION WITH COURT

If it becomes necessary during your deliberations to communicate with me, you will find a form for that purpose included in the material sent into the jury room. Any one of you may communicate with me by filling out the form. Bring it into my Chambers and give it to me or a member of my staff. No member of the jury should ever attempt to communicate with me except by a signed writing; and I will communicate with any member of the jury on anything concerning the case only in writing, or orally here in open court. Remember that you are not to tell anyone—including me—how the jury stands,

numerically or otherwise, until after you have reached a unanimous verdict or have been discharged.

Dated: May 2, 2007

/s/
JAMES WARE
United States District Judge

EXHIBIT 1

The parties have agreed and stipulated that the following relevant facts are true and not disputed:

1. Plaintiff Granite Rock is, and at all times material to this action was, a California corporation engaged in the business of supplying ready mixed concrete for commercial use with its principal office at 350 Technology Drive, Watsonville, California 95077.

2. Plaintiff Granite Rock is an "employer" within the meaning of 29 U.S.C. § 152(2), employing employees in an industry affecting commerce, as defined in 29 U.S.C. § 152(7). At all relevant times in this matter, Plaintiff Granite Rock, a California corporation with an office and place of business in San Jose, California, has been engaged in the manufacture and distribution of concrete and related products. Within any and all relevant 12-month periods concerning this matter, Plaintiff Granite Rock, in the course and conduct of its business operations, has sold and shipped goods or provided services valued in excess of $50,000 directly to customers or business enterprises who themselves meet the jurisdictional requirements of the National Labor Relations Board.

3. Defendant Local 287 is a "labor organization" within the meaning of 29 U.S.C. § 152(5), representing employees in an industry affecting commerce, as defined in 29 U.S.C. § 152(7), in part, with respect to its

representation of employees of Plaintiff Granite Rock.

4. Defendant Local 287 is, and at all times material to this action was, the elected bargaining representative of the employees engaged as drivers at Plaintiff Granite Rock's San Jose Concrete facility ("the bargaining unit" or "bargaining unit employees").

5. During most of the relevant time, twenty-one (21) employees were in the bargaining unit, including: Edward Alvernaz, Sedrick Amar, Douglas Coy, Brian Driscoll, Jesus Galaz, Kenneth Gallardo, George Hafely, Robert Harrell, Donald Hopf, Frank Ibarra, Clyde McIntyre, Timothy McReynolds, Tom Nelson, Christopher Nowak, Steve Nunez, Salomon Orozco, Tim Sanchez, Brian Sheridan, Ryan Vargas, Richard Walrod, and William Zielazowski.

6. George Netto is, and at all relevant times was, a Business Agent of Defendant Local 287, with authority to bind Defendant Local 287 with respect to collective bargaining agreements.

7. George Netto acted within the scope of his authority as a Business Agent of Defendant Local 287 at all relevant times.

8. Plaintiff Granite Rock and Defendant Local 287 have been parties to collective bargaining agreements at Plaintiff Granite Rock's San Jose Concrete facility since at least 1999.

9. The collective bargaining agreement between Plaintiff Granite Rock and Defendant Local 287 for the San Jose Concrete facility that was in existence prior to the Tentative Agreement, expired by its terms on April 30, 2004.

10. On March 23, 2004, Plaintiff Granite Rock and Defendant Local 287 commenced negotiating for a collective bargaining agreement to succeed the expiring contract.

11. In early June 2004, employees engaged in a strike in support of the Union's negotiating position.

12. On the evening of Thursday, July 1, 2004, Plaintiff Granite Rock and Defendant Local 287 met for collective bargaining agreement negotiations. This meeting continued into the morning of Friday, July 2, 2004.

13. The following individuals were present during the negotiation session that began on the evening of Thursday, July 1, 2004: Bruce Woolpert, President of Plaintiff Granite Rock; Shirley Ow, Plaintiff Granite Rock's Director of Human Resources; George Netto, Defendant Local 287's business agent; Chris Nowak and Brian Driscoll, employees of Plaintiff Granite Rock and members of the bargaining unit.

14. On July 2, 2004, Plaintiff Granite Rock presented a last, best and final offer to Defendant Local 287.

15. On July 2, 2004, Plaintiff Granite Rock and Defendant Local 287 reached a tentative agreement (the "Tentative Agreement") on the terms of the new collective bargaining agreement.

16. The parties agreed that the collective bargaining agreement, for which a Tentative Agreement was reached, was conditioned on a ratification vote of the San Jose Concrete bargaining unit members at 9:00 a.m. on July 2, 2004 before the parties would be required to fulfill its terms.

17. Plaintiff Granite Rock manifested a present intent to be bound by the terms of the Tentative Agreement.

18. At about 9:00 a.m. on Friday, July 2, 2004, Defendant Local 287 held a meeting with the San Jose Concrete facility's bargaining unit employees.

19. All of the employees who were members of the San Jose Concrete bargaining unit were present at the 9:00 a.m. meeting on July 2, 2004.

20. On July 2, 2004, Defendant Local 287 took down its picket signs and ceased picketing Plaintiff Granite Rock's San Jose Concrete facility.

(510) 915-6430 is Rome Aloise's cell phone number.

[FILED MAY 03 2007]

CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT CALIFORNIA].
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA
SAN JOSE DIVISION

Granite Rock Company, No. C 04-02767 JW

Plaintiff, VERDICT

v.

Teamsters Local 287,

Defendant.

WE THE JURY IN THE ABOVE-ENTITLED CASE FIND AS FOLLOWS:

QUESTION NO. 1

Do you find that Granite Rock proved by a preponderance of the evidence that there was a vote taken on July 2, 2004 by the employees of Granite Rock's San Jose Concrete facility, who were members of Local 287, to approve or not to approve the Tentative Agreement?

Answer:

YES X NO ___

[If your answer is "Yes," to the above question, then answer Question No. 2. If your answer is "No," skip to Question No. 3.]

QUESTION NO. 2

Do you find that Granite Rock proved by a preponderance of the evidence that on July 2, 2004, a majority of the employees votes to accept the Tentative Agreement?

Answer:

YES X NO ____

[Proceed to Question No. 3].

QUESTION NO. 3.

Do you find that Granite Rock proved by a preponderance of the evidence that on July 2, 2004, Mr. George Netto notified Mr. Bruce Woolpert that the Tentative Agreement had been ratified by the members of Local 287?

Answer:

YES ____ NO X

[Have your presiding juror sign and date this verdict form. Send a note out to Courtroom Deputy Clerk Elizabeth Garcia that "the jury has reached a verdict." Place this verdict form in the special folder provided to you and have your presiding juror bring it with you when you are summoned into Court.]

DATED: May 3, 2007 /s

[Presiding Juror Signature]

Steven Chen

[Print Name of Presiding Juror]

[Dated, May 17, 2007].

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA
SAN JOSE DIVISION

Granite Rock Company, No. C 04-02767 JW

Plaintiff, ORDER COMPELLING ARBITRATION

v.

International
Brotherhood of
Teamsters, Freight, C,

Defendant.

On May 3, 2007, the jury in this case found that (1) there was a vote taken on July 2, 2004 by the employees of Plaintiff Granite Rock's San Jose Concrete facility, who were members of Defendant Local 287, to approve or not to approve the Tentative Agreement and (2) a majority of Plaintiff's employees voted to approve the Tentative Agreement. (*See* Docket Item No. 321.)

The Court previously held that trial in this case would be limited to the single issue of ratification, and that the questions of whether Defendant violated the Tentative Agreement and if so, whether Plaintiff is entitled to damages, were to be determined by arbitration. (*See* Order Granting Defendant's Motion for Partial Summary Judgment

and Denying Defendant's Motion to Strike Plaintiff's Jury Demand, Docket Item No. 83.)

Since the jury decided the ratification issue in Plaintiff's favor, the Court now orders the Agreement. The Court STAYS this action pending arbitration. The Court will conduct a status conference on Monday, November 19, 2007 at 10 AM. The parties shall submit a status report to the Court by November 9, 2007.

Dated: May 17, 2007

/s/
JAMES WARE
United States District Judge

BACK TO WORK AGREEMENT

Granite Rook Company and Teamsters Local 287 enter into the following agreement for the purpose of concluding the labor dispute presently in effect concerning the adopting of a successor Collective Bargaining Agreement.

1. The Company's current proposal for the agreement will be submitted by the Union with its recommendation for ratification by its affected membership immediately upon, but not before, the execution of this Back to Work Agreement.

2. The Company will return all striking employees and all employees who honored the picket lines to work in accordance with their seniority and the terms and conditions of the ratified agreement, as soon as is practicable following ratification.

3. The parties will withdraw any and all unfair labor practice charges, lawsuits, other administrative proceedings, grievances or claims they, and each of them, have filed respecting this activity or conduct of the other, their employees and/or members, or their supporters and sympathizers or the affected labor organizations that have risen out of or relate to the existing labor dispute and/or the negotiations preceding the strike.

4. The parties, and each of them, will not file or pursue any claims, either by way of grievances or legal proceedings of my kind or unfair labor practice charges, against the other, their employees and/or members, or their supporters and sympathizers or against any labor organization in the future arising

out of the existing labor dispute and/or the negotiations preceding the strike.

5. The Company will not institute or pursue any disciplinary action against any of its employees, including its employees who are not represented by the Union, based on or related to their activities or conduct in the course of the existing labor dispute, nor any proceeding against any labor organization, including but net limited to honoring the picket lines of the Union at locations of the Company's operations and/or job sites.

6. Nothing in this Agreement, however, shall prohibit the Union from enforcing the provisions of its Bylaws in the event that internal Union charges are filed by a Teamster member(s) against another Teamster member(s) alleging a violation of such Bylaws or the IBT Constitution related to the existing labor dispute and strike.

For the Union:	For the Employer:
George Netto	Shirley Ow
Teamsters Union Local 287	Granite Rock Company
Date:_____	Date:_____

July 2, 2004

SAN JOSE CONCRETE AGREEMENT

Graniterock Last, Best and Final Offer

SECTION 3—HIRING AND EMPLOYMENT

Add the following sentence between b. and c.:

The Union recognizes that the Employer has not utilized this provision; however, in the event it is used, the following provisions would be applicable.

SECTION 4 — SENIORITY

d. *Seniority Loss.* All seniority shall be considered broken by:

6. An employee who applies for and receives pension payments unless required by federal or state law.

SECTION 5—SCHEDULE OF WORK TIME

b. *Starting Times.* Starting times shall be between 6:00 a.m., ~~6:15 a.m., 6:30 a.m., 6:45 a.m., 7:00 a.m., 7:30 a.m., 8:00 a.m., 8:30 a.m.,~~ and 9:00 a.m. on one-quarter (1/4) hour intervals. These starting times shall apply to Saturdays. Sundays and holidays. Other starting times may be permitted on a temporary basis if the Union consents in advance.

c. *Guaranteed Work Day* - In the event an employee is put to work, the employee shall be

guaranteed four (4) hours work ~~or pay~~; if more than four (4) hours are worked, guaranteed six (6) hours ~~pay~~work, and if more than six (6) hours are worked, guaranteed eight (8) hours ~~pay~~work. However, in the event of industrial injury, the employee shall receive eight (8) hours pay. In connection with the guaranteed work day, it is understood that employees shall cooperate with the Employer in performing work other than driving in accordance with past practice. Employees who leave work voluntarily or who leave work because of illness shall be paid for hours worked.

f. *Saturday, Sunday and Holiday Work* - When work is performed on Saturday, employees shall receive a minimum of four (4) hours pay for any part of a day, to be paid for at the rate of time and one-half (1-1/2), except as otherwise provided in this Agreement.

When work is performed on Sundays or holidays, employees. shall receive a full day's pay, as described in c. above, at the overtime rate for any part of a day, except as otherwise provided in this Agreement. The senior employee shall be offered Saturday, Sunday and holiday work where qualified.

j. (New) *Voluntary Call-In Work* - When additional employees are needed after 10:00 a.m. in response to new orders or orders which over-run their initial order quantities, the Employer may offer the work in seniority order to those drivers who have indicated on a list maintained by the Employer their willingness to perform such call-in work. Employees may add or delete their names on a weekly basis from this list. Employees reporting to work shall be paid no less than four (4) hours. The intent is to

utilize this section when there is new work of at least four (4) hours arising from new orders or orders which overrun. It is not the intent of this provision for employees who reported under the starting times in this Agreement (Section 5b) to suffer a reduction of hours. In the event the customer needs change, the Employer may utilize the employee for yard work in order to meet the four (4) hour minimum.

SECTION 8—SCHEDULE OF WAGES

b. *All New Employees.* · Replace with the following:

The following minimum trainee rates shall apply to new employees with little previous experience and training:

1st 1,000 hours of work	·	80%
2nd 1,000 hours of work	·	90%

e. (New) *Casual Relief Employees.* Casual relief employees may be utilized for the purposes of fill-in for absent employees only. Such relief employees shall be required to comply with Section 3-Hiring and Employment. Casual employees may be utilized during the period June 1 through October 31 only. A casual employee will be required to pay a monthly service fee (dues) to perform work covered under this Agreement but will not be required to pay the Union Membership initiation fees until the employee has completed the probationary period in Section 4-Seniority, or the employee continues to perform work for the Employer beyond October 31 during the same calendar year. If seniority is achieved, Health &

Welfare contributions will be made according to Section 11·Health and Welfare. Contributions to the Supplemental Income 401(K) Plan and Teamsters Pension Trust Fund will be made on the first hour of work. Nothing in this section shall modify or reduce the work afforded to senior employees as described in Section 4. Seniority.

f. (New) These wage rates below are minimums and the Employer may pay any employee more.

SECTION 9—HOLIDAYS

Effective May 1, 2004

The following holidays, when not worked, shall be paid for at eight (8) times the employee's straight time hourly rate: New Years Day, Presidents' Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Friday After Thanksgiving Day, Day Before Christmas, Christmas Day, and the Employee's Birthday*. ~~The Day Before Christmas shall be considered a holiday in lieu of Admission Day. Employees qualifying for Admision Day (September 9) each year in accordance with the qualifying provisions of Section 9, shall be paid for the Day Before Christmas as a paid holiday.~~

Employee's birthday shall be considered a holiday. However, the individual employee shall provide the Employer with not less than two (2) calendar weeks advance notice of the date upon which the employee's birthday falls, in which event the employee shall be allowed to observe the holiday on the birthday, or such other day during the same calendar week as may be determined by mutual agreement between the employer and the individual

employee. Where the individual employee fails to provide said two (2) calendar weeks advance notice of the date upon which the birthday falls, the date upon which the holiday shall be observed will be by mutual consent of the employee and Employer.

Effective January 1, 2005

The following holidays, when not worked, shall be paid for at eight (8) times the employee's straight time hourly rate: New Year's Day, ~~Presidents' Day,~~ Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Friday After Thanksgiving Day, Day Before Christmas, Christmas Day, and ~~the Employee's Birthday~~* two (2) Floating Holidays.

The date upon which the Floating Holidays shill be observed will be by mutual agreement of the Employee and Employer. Employees who have established seniority by January 1 of each year shall be eligible for the two (2) Floating Holidays.

SECTION 10—VACATIONS

Replace c., d., e., f., g and h. with the following vacation schedule (no change in the benefit):

Years of Service	Vacation Hours	Days
1	48	6
2	64	8
3-4	80	10
5-9	120	15
10-19	160	20
20 and after	200	25

SECTION XX—RETIREE HEALTH AND WELFARE

Upon written notification from the Union that the employees wish to allocate their increase to fund retiree health and welfare coverage, the following language will apply:

Effective _____ 1, 200__, payable in [following month], the Employer shall contribute to the Teamsters Benefit Trust Retirement Security Plan an amount of one hundred forty seven dollars and thirty-one cents ($147.31) per month for each employee who has been paid for eighty (80) hours or more during the calendar month. If there is an increase in the contribution rate, the Union may elect to allocate the necessary amount from the wage and fringe benefit increases effective January 1 or June 1. In the event there is an increase in the Retiree Health and Welfare premium sifter the January 1 or June 1 increase has been allocated, the Straight-time rate shall be reduced to cover the increase. One hundred seventy-three (173) hours per month shall be used in calculating a conversion from dollars per month to cents per hour for health and welfare purposes.

Modification to language in Section 8—Schedule of Wages, Additional Increases:

Any increase in the Health and Welfare contributions to the Teamsters Benefit Trust Fund for Plan I or Teamsters Benefit Trust Retirement Security Plan (if applicable) shall be provided for and allocated from the January 1 and/or June 1 increases. Any balance remaining after allocation to Health and Welfare and/or Retiree Health and

Welfare (if applicable), the Union may elect at its option upon at least sixty (60) days' written notice to the Employer, be allocated to either wages, pension and/or the supplemental income 401k plan. One hundred seventy-three (173) hours per month shall be used in calculating a conversion from dollars per month to cents per hour for Health and Welfare and/or Retiree Health and Welfare (if applicable) purposes. In the event an Increase in Health and Welfare and/or Retiree Health and Welfare (if applicable) is needed after the January 1 and/or June 1 increase, the straight-time wage rate shall be reduced to reflect the increase unless the Employer and Union meet to negotiate a lessor cost plan. No further allocation of the increase beyond the one hundred seventy-three hour divisor shall be applied to wages or to any other existing funded fringe.

SECTION 14—SICK LEAVE

Such sick leave with pay shall be applicable! only in cases of bona fide illness or accident of the employee, or to care for a sick child, parent, spouse or domestic partner. In cases of apparent abuse the Employer may require a doctor's certificate or other reasonable proof of illness. Sick leave shall be paid in the following manner:

SECTION 15—JURY DUTY

When an employee who his established seniority is unable to report for work on his/her assigned shift by reason of jury duty, the employee will, upon furnishing written proof of such service, be paid the difference between the jury pay, if any, and the amount the employee would have been paid if the employee had worked an eight hour day, with a

maximum of thirty-five (35) days per year at the appropriate rate of pay if scheduled to work.

a. ~~Day shift e~~Employees called jury duty or examination and excused by the court prior to 12:00 noon shall return to work for the balance of their day shift and shall be paid the difference between the jury pay or examination pay, If any, and their straight-time pay lost.

~~b. Night or swing shift employees called for jury duty or examination and excused by the court prior to noon shall report for their regular night shift or swing shift and shall not be eligible for any jury pay.~~

~~c. Night shift or swing shift employees (except as provided in b. above) shall not be required to work on jury duty in the daytime and work night shift or swing shift on the same calendar day, but shall receive the difference between their jury pay and their regular shift pay lost.~~

~~e. Pay for jury duty shall not apply in any case where an employee voluntarily seeks jury duty.~~

SECTION 29—GRIEVANCE PROCEDURE

e. If the dispute is referred to arbitration by either party, the parties agree that the Arbitrator shall be either ~~Charles Askin or~~ Franklin Sliver or another Arbitrator mutually agreed upon by both parties.

SECTION 22—STRIKES AND LOCKOUTS

In addition, it will not be considered a violation of this agreement and an employee will not be permanently replaced for honoring a lawful primary

picket line sanctioned by Joint Council of Teamsters No. 7 or the Building Trades Council and/or the Central Labor Council, provided, however, picket lines sanctioned or authorized above must also be approved by Teamsters Local 287, at any non-Employer property, except when the following situations arise at such non-Employer property: (1) a reserved gate system has been established; or (2) the Union has failed to provide the Employer with written notice of a lawful primary labor dispute ~~prior to the close of business on the day~~ twenty-four (24) hours before any employee refuses to enter property where the picket line has been established; (3) the picket line has been established by any union with a primary labor dispute with any Employer covered by this agreement.

SECTION 24—GENERAL PROVISIONS

p. *Attendance at Company Meetings.* No employee shall be required to attend a company meeting on employee's own time. An employee shall receive pay for attending mandatory safety meetings for the duration of the meeting with no less than two (2) hours at the straight-time rate of pay. The starting time of safety meetings may begin at 5:00 a.m. In addition, the Employer may provide one day (maximum of eight hours) of customer-related training during the calendar year with employees paid at their straight-time rate of pay for attendance. If held on Saturday, the employee shall be paid the straight-time rate of pay until completion of forty (40) hours in the workweek.

SECTION 27—TERM OF AGREEMENT

Four-year agreement, May 1, 2004 through April 30, 2008

ECONOMICS

Month	Economic Package	Rate Adjustment	Total
6/1/04	$ .31	$ 1.50	$ 1.81
6/1/05	$ 1.00		$ 1.00
1/1/06		$ .50	$ .50
6/1/06	$ 1.00		$ 1.00
1/1/07		$ .50	$ .50
6/1/07	$ 1.00*		$ 1.00
1/1/08		$ .50	$ .50

Total Economic Package = $3.31

Total Rate Adjustment = $3.00

*$.10 may be allocated to supplemental dues

The Union may allocate the economic and rate adjustment increases to wages, pension, supplemental income 401(k), health and welfare and/or retiree health and welfare

This Supposal is subject to *formal acceptance by the Union and Employees* no later than Friday, July 2, 2004 by 9:00 a.m.; otherwise this Supposal is withdrawn.

Letter of Understanding to provide for the following:

SECTION 8—SCHEDULE. OF WAGES

d. *Saturday Work*

November 1 through March 31

If employees are needed to perform work on Saturday, Saturday work shall be offered In the following manner:

Driver 1: The first employee in seniority who has worked 32 or less straight time hours*

Driver 2: The first employee with the highest seniority who has worked 40 straight time hours

Driver 3: The second employee in seniority who has worked 32 or less straight time hours*

Driver 4: The second employee with the highest seniority who has worked 40 straight time hours

Driver 5: The third employee in seniority who has worked 32 or less straight time hours

Driver 6: The third employee with the highest seniority who has worked 40 straight time hours

If additional drivers are needed, the alternating order described above would continue.

*Saturday work shall be offered to employees who have worked thirty-two (32) or less straight time hours during the normal workweek (Monday through Friday) as described above. Such Saturday

work shall be performed at the straight time rate of pay until the employee has completed a forty (40) hour workweek. Hours thereafter shall be considered overtime.

AGREEMENT

This Agreement, entered into by and between Granite Rock Company at its San Jose Concrete facility, 11711 Berryessa Road, San Jose, California, hereinafter called "Employer" and Teamsters Local 287 affiliated with the International Brotherhood of Teamsters, Chauffeurs, and Warehousemen of America, hereinafter called the "Union".

The Union shall have exclusive jurisdiction over all work covered by this Agreement.

All regular employees and equipment of the Employer covered by this Agreement shall perform work before any other employees or equipment are utilized.

SECTION 1—UNION RECOGNITION

a. The Union is hereby recognized as the representative for bargaining purposes of all persons performing work falling within the classifications hereinafter set forth.

b. The Union hereby recognizes the Employer as the collective bargaining representative for its members covered by this Agreement.

c. The Employer agrees not to enter into any agreement or contract with its employees individually or collectively which in any way conflicts with the terms and conditions of this Agreement. If the Employer continues to violate this section of the Agreement, after receipt of written

notice from the Union, the Union may take any legal or economic action against the Employer and this section shall not be subject to grievance procedures of this Agreement.

SECTION 2—EQUIPMENT

a. *Additional Ready Mixed Trucks.* For the purpose of preserving work and job opportunity for employees it is agreed that no ready mix trucks are to be operated other than those that are company owned or leased from the Employer covered by this or any other Teamster agreement whenever practical.

Transfer of Equipment. The Employer has the right to transfer equipment between any company owned operations. However, such transfer of equipment shall not occur to avoid the terms of this Agreement. In the event the Employer permanently transfers equipment for more than 30 days from one local jurisdiction to another within Joint Council of Teamsters #7, the employees affected will be offered the opportunity to move with the equipment by seniority. If the employee chooses to go with the equipment, he/she shall go to the bottom of the seniority list for daily work assignment but will retain the company seniority for all other purposes; provided, however, all employees of the company who have seniority (and are qualified) but are on layoff will be given preference to work on this equipment before the transferred employee. The Union shall be notified of any transfer of equipment

b. *Utilization of Equipment.* The Employer may dispatch an employee for a maximum of one load to

another plant across Union jurisdictional lines after 2:00 p.m.

SECTION 3—HIRING AND EMPLOYMENT

a. Only members in good standing in the Union shall be retained in employment. For the purposes of this section, "members in good standing" shall be defined to mean employee members in the Union who tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership. Non-members of the Union hired by the Employer must complete membership affiliation on the thirty-first (31st) day of employment, and the Union agrees to accept said non-members Into membership on the same terms and conditions generally applicable to other members. Upon written mince from the Union of failure on the part of any individual to complete membership in the Union as above required, or of failure to continue payment of dues to the Union, the Employer shall within seven (7) days of such notice discharge said employee.

b. *Exclusive Hiring.* Except when the Employer fills a driver position with an existing Graniterock employee, the Employer shall notify the union office, either in writing or by telephone, stating the location, starting time, and approximate duration of the job, the type of work to be performed; and the number of workers required.

The Union recognizes that the Employer has not utilized this provision; however, in the event it is used, the following provisions would be applicable.

c. *Dispatching Standards.* Upon receipt of such notice, the Union shall endeavor to furnish the workers requested. Selection of workers for referral to jobs shaft be on a non-discriminatory basis and shall not be based on or in any way affected by Union membership, by-laws, rules, regulations, constitutional provisions, or any other aspect of Union membership, policies or requirements. Such selection will be made on the following basis:

1. The Union shall maintain a list of all workers seeking jobs who have been employed on the type of work and in the Union covered by this Agreement for a period of at least one (1) year, which list shall hereinafter be called "List A". The Union shall maintain a separate list of all workers seeking jobs who do not meet that requirement, which list shall hereinafter be called "List B".

2. Workers' names shall be entered on said lists in the order in which they notify the Union of their availability for jobs.

3. After each worker's name shall be entered a designation corresponding to the type or types of work which the worker is qualified to perform. The Employer shall have the right to reject any worker referred by the employment office of the Union.

4. In dispatching workers, preference shall be given to workers on List A. Within each list, preference shall be given to those whose designations correspond to the type of work involved, in the order in which their names appear on the list.

If there are not sufficient workers on List A whose designations correspond to the type of work involved,

preference shall be given to other workers on said list in the order in which their names appear, and the same procedure shall be followed with List B, should the names on List A be exhausted. The dispatcher need not dispatch a worker next in order if such worker is, because of obvious physical incapacity, unable to perform the work involved.

5. The Employer may call for a particular worker by name who has qualified for the "A" List regardless of the worker's position on that list. Only after the "A" List Is exhausted may the Employer call for a particular worker by name on the "B" List who has previously worked for the Employer or who has been trained by the Employer.

"A" List Registrants. An individual who has been employed pursuant to the terms of this Agreement or the Bay Area Building Material Teamsters Agreement for twelve hundred (1200) hours or more during the twelve (12) month period preceding his/her registration date, shall be entitled to register on the "A" List.

"B" List Registrants. An individual who has been available for employment or employed pursuant to the terms of this Agreement or the Bay Area Building Material Teamsters Agreement for a period of one (1) year or more preceding his/her registration, or who has been trained by the Employer, shall be entitled to register on the "B" List provided he/she is not otherwise entitled to register on the "A" List. The Employer shall notify the Union on a current basis the names and social security numbers of those individuals who have been trained and those who are being trained.

d. *Referral.* For each worker dispatched, the Union shall send the Employer, with the worker or by mail or fax, written referral slips, one (1) copy to be given to the Employer. The Employer may reject any Worker for employment dispatched by an employment office, provided; however, that any such worker reporting for work at the agreed time and the designated place and rejected by the Employer shall be paid in the amount provided in Section 7 of this Agreement unless such worker is rejected because the person reported in a condition unfit for work or because the worker in fact does not have the experience or qualifications specified in the Employer's request. The Employer may reject a worker who has been discharged for a major cause regardless of the date of discharge. Rejection of a worker must be by written notice to the Union.

"Do not send" letters shall remain in effect for a maximum period of one (1) year. Thereafter, workers shall be eligible to be dispatched to the Employer that originated the "do not send" letter. Such time restrictions shall not be applicable if the "do not send" letter was originated because of a major dischargeable offense.

e. *Notification.* If the Employer calls the Union employment office for workers and if the employment office is closed or is unable to furnish qualified workers for immediate dispatch, then the Employer is free to obtain workers from any source or sources. The Employer shall in such event notify the Union within twenty-four (24) hours of the name, address and social security number of workers so hired. However, if prior to the close of a work day the Employer knows that additional worker(s) will be

required for the following day, the Employer shall notify the employment office.

f. *Labor Management Relations Act.* In applying the above provisions, it is agreed that the parties will adhere to Section 8 (a) (3) and 8 (b) (2) of the Labor Management Relations Act, as amended, so long as such sections remain in effect.

Exclusions from Application. This Agreement shall not apply to superintendents, assistant superintendents, general foremen, foremen or any supervisors in charge of any class of labor, timekeepers, messenger persons, confidential employees and office help. No foreman shall be allowed to operate any mechanical equipment

g. *Equal Employment Opportunity.* No employee or applicant for employment covered by this Agreement shall be discriminated against because of membership in the Union or activities on behalf of the Union, and the Union agrees that employees covered hereby shall be admitted to membership without discrimination. In accordance with applicable local, state and federal laws and regulations, neither the Employer, the Union or the employees shall discriminate or engage in behavior and/or conduct of a harassing nature (involving race, creed, color, age, sex, religion, national origin, ancestry, sexual orientation, handicap, disability or otherwise) against anyone doing business with the Employer or any employee or applicant for employment covered by this Agreement. Additionally, any discrimination, harassment, coercion or intimidation by the Employer, the Union or the employees against any employee or applicant for employment shall be a violation of this

Agreement. To facilitate prompt resolution of complaints filed under the provisions of this Section, the parties recognize the Employer has available to employees internal investigative complaint procedures that are established to resolve such disputes. Employees are encouraged to utilize the Employer's complaint procedures.

SECTION 4—SENIORITY

a. *Seniority Principle.* The application of the seniority principle shall be on a plant basis for daily work assignments both in terms of reduction and recall.

b. *Probationary Employees.* Employees shall have no seniority rights and shall be considered probationary employees until they have first been employed for a total of forty-five (45) work days in any six (6) consecutive month period for the Employer under this Agreement. During the probationary period, employees may be terminated by the Employer for any reason without recourse, notwithstanding any provision in this Agreement to the contrary. On the date that employees complete their probationary period, the seniority date for all purposes shall be retroactive to forty-five (45) work days prior to such qualification date.

c. *Seniority Loss.* All seniority shall be considered broken by:

1. Discharge for just cause;
2. Resignation;
3. Twelve (12) consecutive months of unemployment;

4. Failure to report to work after receiving a recall letter. Notice of recall shall be sent by registered mail to the employee's last known address, which address shall be deemed conclusive on all parties. An employee will have five (5) work days in which to report for work from the date of receipt or attempted delivery.

5. If a member takes withdrawal or transfer card, or is suspended from the Union and as provided for in Section 3a. of this Agreement, fails to regain good standing status in the Union;

6. An employee who applies for and receives pension payments unless required by federal or state law.

Posting. The Employer shall send to the Union, a current copy of the seniority list once each six (6) months, or whenever there is a change in said seniority list, whichever occurs sooner. A copy of the list shall be posted on the Employer's bulletin board. The seniority date of an employee shown on such list shall be deemed conclusive on all parties unless the employee utilizes the grievance procedure under this Agreement within thirty (30) days after the first posting of such employee's seniority date to protest such seniority date.

d. *Single Company Seniority.* No employee shall maintain seniority at more than one company.

e. *Seniority Protection.* An employee who has been "continuously employed" as defined in Section 14—Sick Leave of this Agreement, and is absent from work because of bona fide industrial or non-industrial accident or illness shall continue to accrue seniority, including eligibility for vacation, for a period of up to one (1) year from the day of the last

employment prior to being absent for such bona fide illness or accident. If any such illness or injury shall continue beyond one (1) year, such additional time shall not accrue to the employee's seniority, and if the employee is able to return to work, the anniversary date for seniority and vacation purposes shall be moved forward by the amount of time the total absence shall have exceeded one (1) year.

f. *Daily Work Assignment.* All available daily work shall first be assigned on the basis of straight seniority by plant among all employees. For the purposes of this section, straight seniority is defined to mean that the senior employee shall be dispatched each work day that work is available. The senior employee shall be offered first starts where practical. The Employer agrees that the words "where practical" in this section shall not be used in dispatching to circumvent the senior employee's right to first starts and overtime. The employees retained under these conditions must be qualified and able to perform the work.

SECTION 5—SCHEDULE OF WORK TIME

a. *Work Day—Work Week.* Except as otherwise provided in this section, the regular work week shall consist of five (5) working days Monday through Friday. All work in excess of the regular week's work and in excess of eight (8) hours in any one day shall be paid for at the rate of time and one-half. Work performed before the regular starting time, or after the regular quitting time shall be considered overtime.

b. *Starting Times.* Starting times shall be between 6:00 a.m. and 9:00 a.m. on one-quarter (1/4)

hour intervals. These starting times shall apply to Saturdays, Sundays and holidays. Other starting times may be permitted on a temporary basis if the Union consents in advance.

c. *Guaranteed Work Day.* In the event an employee (regular or extra) is put to work, Monday through Friday, the employee shall be guaranteed four (4) hours work; if more than four (4) hours are worked, guaranteed six (6) hours work, and if more than six (6) hours are worked, guaranteed eight (8) hours work. However, in the event of industrial injury, the employee shall receive eight (8) hours pay. In connection with the guaranteed work day, it is understood that employees shall cooperate with the Employer In performing work other than driving in accordance with past practice. Employees who leave work voluntarily or who leave work because of illness shall be paid for hours worked.

d. *Saturday Work.*

April 1 through October 31

Saturday work shall be offered first in seniority order to those employees who have not worked five (5) days during the normal work week (Monday through Friday). Such Saturday work shall be performed at the straight time rate of pay for the first eight (8) hours. The starting time as provided in Section 5 shall be waived for this work; however, no starting times shall be permitted after 8:00 a.m., starting times shall be on the hour and one-half (1/2) hour increments.

Should there be a need for additional workers after making the offer as described above, and there

remain employees that have not worked five (5) days as described, then the Employer shall assign such work by inverse seniority order until such type remaining workers have been exhausted. Should there be further need for workers the provisions of Section 5e shall apply.

If those employees having worked five (5) days during the regular work week (Monday through Friday) shall not be subject to this provision and the overtime rates provided herein shall be applicable for Saturday work.

It is agreed that regular customer work normally performed during the regular work week (Monday through Friday) shall not be subject to this provision and the overtime rates provided herein shall be applicable for Saturday work.

In order to preserve work for bargaining unit employees, the Union has the authority to allow its members to perform commercial work on Saturday in accordance with this sub-section. The batching and delivery of concrete with respect to the above shall only occur within the geographical jurisdiction of the Union giving the authority.

The provisions of this sub-section may be modified and/or waived with the express permission of the Union involved. It is not the intent of this provision to defeat or render meaningless the overtime provision of this Agreement but rather to use such modification or waiver for the express purpose of securing that market now being served by firms not signatory to this agreement affecting the jobs of workers employed hereunder.

It shall not be considered a violation of this provision should in the course of daily business, a worker employed under the terms and conditions of this provision be dispatched for no more than one (1) load (clean-up/end of day) to those jobs described above. Such worker shall be paid at the overtime rate for that load. In the event a worker is dispatched more than once to such job(s), then the worker shall be paid overtime for all hours worked.

November 1 through March 31

If employees are needed to perform work on Saturday, Saturday work shall be offered in the following manner:

Driver 1: The first employee in seniority who has worked 32 or less straight time hours*

Driver 2: The first employee with the highest seniority who has worked 40 straight time hours

Driver 3: The second employee in seniority who has worked 32 or less straight time hours*

Driver 4: The second employee with the highest seniority who has worked 40 straight time hours

Driver 5: The third employee in seniority who has worked 32 or less straight time hours*

Driver 6: The third employee with the highest seniority who has worked 40 straight time hours

e. *Overtime Rate.* Overtime rate shall be time and one-half (1-1/2). All work performed on Saturday shall be paid at the overtime rate except as

otherwise provided in this. Agreement. Double the straight time hourly rate shall be paid for all work performed on Sundays and holidays. There shall be no pyramiding of overtime (overtime payments shall not be duplicated for the same hours worked).

f. *Saturday, Sunday and Holiday Work.* When work is performed on Saturday, employees shall receive a minimum of four (4) hours pay for any part of a day, to be paid for at the rate of time and one-half (1-1/2), except as otherwise provided in this Agreement.

When work is performed on Sundays or holidays, employees shall receive a full day's pay, as described. in c. above, at the overtime rate for any part of a day, except as otherwise provided in this Agreement. The senior employee shall be offered Saturday, Sunday and holiday work where qualified.

g. *Shift Work.* Where three (3) shifts are worked in continuous service, time for the first shift to begin work shall be between 6:30 a.m. and 7:30 a.m., for the second shift between 2:30 p.m. and 3:30 p.m., and for the third shift between 10:30 p.m. and 11:30 p.m.; and where two shifts are worked, time for the first shift to begin work shall be between 6:00 a.m. and 8:00 a.m., and for the second shift between 2:00 p.m. and 4:00 p.m.; provided, however, that starting times may by mutual consent be other than stated above in order to coordinate the work of the dealer with the work of the contractor. When two (2) or three (3) shifts are employed, eight (8) hours shall constitute a day's work for the first shift for which eight (8) hours straight time shall be paid and seven and one-half (7 & 1/2) hours shall constitute a day's work for the second shift for which eight (8) hours

straight time shall be paid; and seven (7) hours shall constitute a days work for the third shift for which eight (8) hours straight time shall be paid.

h. *Special Single Shift.* When the Employer produces evidence in writing to the Union of a bona fide job requirement in which work can only be done outside the normal shift hours, and notifies the Union in writing by fax prior to the start of such special shift (except in the case of emergency), the Employer may initiate such special shift of eight (8) consecutive hours (not in conjunction with any other shift), exclusive of meal period, Monday through Friday. This special single shift may start at any time between the hours of 8:00 p.m. and 11:30 p.m. and may not continue beyond 7:30 a.m. the following morning. There shall be a five driller ($6.00) per hour premium at the applicable rate for each hour worked. If an employee works more than eight (8) hours under the provisions of this subsection, the special shift premium shall be included in the calculation of overtime. The scheduling of work on this special single shift shall not result in the loss of wait opportunity for those scheduled, i.e. five (5) straight time days Monday through Friday.

In order to utilize equipment for the next shift, eight (8) hours work shall consist of a shift. Employees shall receive an eight (8) hour rest break between shifts.

I. *Call back.* In the event of an emergency an employee may be recalled to work by the Employer after he/she has completed his/her regular shift and left the Employer's premises for home and he/she shall be guaranteed three (3) hours' pay at the overtime rate for three (3) hours or less work. This

sub-section shall not be used to circumvent the shift work or special single shift provided in g. and h. above.

j. *Voluntary Call-In Work.* When additional employees are needed after 10:00 a.m. in response to new orders or orders which over-run their initial order quantities, the Employer May offer the work in seniority order to those drivers who have indicated on a list maintained by the Employer their willingness to perform such call-in work. Employees may add or delete their names on a weekly basis from this list. Employees reporting to work shall be paid no less than four (4) hours. The intent is to utilize this section when there is new work of at least four (4) hours arising from new orders or orders which over-run. it is not the intent of this provision for employees who reported under the starting times in this Agreement (Section 5b) to suffer a reduction of hours. In the event the customer needs change, the Employer may utilize the employee for yard work in order to meet the four (4) hour minimum.

SECTION 6—LUNCH PERIODS

a. One period of one-half (1/2) hour shall be taken for lunch during the regular work day, unless otherwise specifically instructed by the Employer. Said lunch period shall commence between the fourth (4th) and fifth and one half (5 & 1/2) hour of employment If workers are instructed to work through their lunch period, they shall be paid time and one-half (1-1/2) for such overtime, and in addition shall be allowed fifteen (15) minutes to eat immediately after the load that prevents the worker from taking lunch during the above lunch starting

times. Such payment shall be separate and distinct from any overtime payment.

Those employees working on Saturday, Sunday or holidays on overtime who are instructed to work through their lunch period shall be allowed fifteen (15) minutes to eat or be paid for same.

b. When additional consecutive shifts are worked, one-half (1/2) hour lunch shall be taken during each such shift at the end of the half (1/2) shift.

c. On a normal single shift operation, employees working overtime two and one-half (2 & 1/2) hours beyond their normal quitting time or later and not having been allowed an unpaid thirty (30) minute supper period shall be paid one-half (1/2) hour extra for supper. In the event that It is necessary to work three (3) hours beyond their normal quitting time, the employees shall in addition be allowed fifteen (15) minutes to eat as the work load permits.

d. It is agreed and understood that any employee who abuses the fifteen (15) minutes allowed in paragraph a. will be subject to discipline in accordance with Section 19.

SECTION 7—SHOW UP TIME

All employees shall keep Employer advised at all times of their current address and phone number. In the event an employee is instructed to report for work and does report for such work but is not given any work the employee shall be paid for two (2) hours work for such loss of dm provided that after showing up the employee stands by for a time not to

exceed a minimum one (1) hour. If the employee is requested to stand by and does so for one (1) hour or more is given no work, the employee shall be paid for four (4) hours pay at his/her regular straight time rate of pay. Employees whose services are not needed on a regular work day must be notified the night before; otherwise such employee will be considered as having been instructed to report for work. The Employer shall call the worker at least one. (1) hour prior to the time the employee is ordered to report for work, in which case no show-up time shall be paid. In the event of rain at the employee's residence during the night, or over the weekend, the employee shall call the Employer to determine from the Employer whether or not the employee should report for work that day. The Employer shall have an authorized person and/or a telephone number to call at least one hour prior to the first scheduled starting time. No employee shall be discriminated against or laid off for justly claimed show-up time as provided in this section.

Employees who do not have a scheduled starting time must report Within one (1) hour of being called. Employees who do not report within the one (1) hour period, shall be paid from the time they actually start.

SECTION 8 - SCHEDULE OF WAGES

a. *Classification of Work*

	06/01/04
Ready-mix Drivers	$20.39 (plus any allocation of $1.81 increase)

b. *All New Employees.* The following minimum trainee rates shall apply to new employees with little previous experience and training:

1st 1,000 hours of work	-	80%
2nd 1,000 hours of work	-	90%

c. *New or Larger Equipment.* In the event larger or new type equipment is placed in service, an hourly rate shall be negotiated for same without delay. In the event of a dispute, same shall be referred to the grievance procedure of this Agreement within ten (10) days. The rate shall be effective on the date the equipment becomes operative.

d. *Overtime Computation.* Overtime past the hour and half hour will be computed by the 1/10th hour (6 minutes) as follows: 1 through 2 minutes - no pay; 3 through 8 minutes - 1/10th hour (6 minutes); 9 through 14 minutes - 2/10ths hour (12 minutes); 15 through 20 minutes - 3/10ths hour (18 minutes); 21 through 26 minutes - 4/10ths hour (24 minutes); 27 through 30 minutes - 5/10ths hour (30 minutes). Notwithstanding the above, employees who are required by the Company to standby on overtime shall be paid 3/10ths of an hour or 18 minutes pay.

e. *Casual Relief Employees.* Casual relief employees may be utilized for the purposes of fill-in for absent employees only. Such relief employees shall be required to comply with Section 3 -Hiring and Employment. Casual employees may be utilized during the period June 1 through October 31 only. A casual employee will be required to pay a monthly service fee (dues) to perform work covered under this Agreement but will not be required to pay the Union

Membership initiation fees until the employee has completed the probationary period in Section 4- Seniority, or the employee continues to perform work for the Employer beyond October 31 during the same Calendar year. If seniority is achieved, Health & Welfare contributions will be made according to Section 11-Health and Welfare. Contributions to the Supplemental Income 401(K) Plan and Teamsters Pension Trust Fund will be made on the first hour of work. Nothing in this section shall modify or reduce the work afforded to senior employees as described in Section 4. Seniority.

f. These wage rates below are minimums and the Employer may pay any employee more.

*ADDITIONAL INCREASES—2005, 2006, 2007 and 2008**

It is agreed the following additional increases shall be effective in the amounts and on the dates set forth hereunder:

Month	Economic Package	Rate Adjustment
6/1/04	$ .31 per hour	$1.50 per hour
6/1/05	$1.00 per hour	
1/1/06		$ .50 per hour
6/1/06	$1.00 per hour	
1/1/07		$ .50 per hour
6/1/07	$1.00 per hour**	
1/1/08		$ .50 per hour

*The Union may elect at its option upon at least sixty (60) days written notice to the Employer to allocate the increases to wages and/or existing funded fringes.

**$.10 may be allocated to supplemental dues

Any increase in the Health and Welfare contributions to the Teamsters Benefit Trust Fund for. Plan I or Teamsters Benefit Trust Retirement Security Plan (if applicable) shall be provided for and allocated from the January 1 and/or June 1 increases. Any balance remaining after allocation to Health and Welfare and/or Retiree Health and Welfare (if applicable), the Union may elect at its option upon at least sixty (60) days' written notice to the Employer, be allocated to either wages, pension and/or the supplemental income 401k plan. One hundred seventy-three (173) hours per month shall be used in calculating a conversion from dollars per month to cents per hour for Health and Welfare and/or Retiree Health and Welfare (if applicable) purposes, In the event an increase in Health and Welfare and/or Retiree Health and Welfare (if applicable) is needed after the January 1 and/or June 1 increase, the straight-time wage rate shall be reduced to reflect the increase unless the Employer and Union meet to negotiate a lessor cost plan. No further allocation of the increase beyond the one hundred seventy-three (173) hour divisor shall be applied to wages or to any other existing funded fringe.

SECTION 9—HOLIDAYS

Effective May 1, 2004

The following holidays, when not worked, shall be paid for at eight (8) times the employee's straight time hourly rate: New Years Day, Presidents' Birthday, Memorial Day, Fourth of July, Labor Day,

Thanksgiving Day, Friday after Thanksgiving Day, Christmas Day, and the Employee's Birthday.

Employee's birthday shall be considered a holiday. However, the individual employee shall provide the Employer with not less than two (2) calendar weeks advance notice of the date upon which the employee's birthday falls, in which event the employee shall be allowed to observe the holiday on the birthday, or such other day during the same calendar week. Where the individual employee fails to provide said two (2) calendar weeks advance notice of the date upon which the birthday falls, the date upon which the holiday shall be observed will be by mutual consent of the employee and Employer.

Effective January 1, 2005

The following holidays, when not worked, shall be paid for at eight (8) times the employee', straight time hourly rate: New Years Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Friday After Thanksgiving Day, Day Before Christmas, Christmas Day, and two (2) Floating Holidays.

The date upon which the Floating Holidays shall be observed will be by mutual agreement of the Employee and Employer. Employees who have established seniority by January 1 of each year shall be eligible for the two (2) Floating Holidays.

a. The above holidays shall be paid only if the employee:

1. Has established seniority under the terms of this Agreement.

2. An employee must work, or have reported for work, on the regularly scheduled work days immediately preceding and following said holidays, unless an absence is due to the express permission of the Employer or due to a bona fide illness accompanied by a doctors certificate.

b. If a specified paid holiday falls on a Saturday, the holiday shall be paid for as such at eight (8) times the employee's straight time hourly rate.

c. If a specified paid holiday falls on a Sunday, it shall be observed the following Monday, and the holiday shall be paid for as such at eight (8) times the employee's straight time hourly rate.

d. Employees who are eligible for holiday pay who are required to work on the above specified holidays shall receive double the regular straight time rate of pay in addition to holiday pay.

e. Employees ordered to work on holidays and who fail to report shall forfeit all holiday pay.

f. If a specified paid holiday falls during a paid vacation period, the employee shall have the option to receive an additional days pay or a day off with pay.

g. Employees absent due to illness or injury shall be paid for holiday pay for the remainder of the month and thirty (30) calendar days thereafter. Employees on leave of absence shall not receive holiday pay.

h. An employee with seniority rights who is laid off due to lack of work shall be paid for any holiday

which occurs within thirty (30) days after layoff and within thirty (30) days prior to recall. This subsection h. shall not apply to employees who voluntarily quit or who are discharged in accordance with Section 19.

SECTION 10—VACATIONS

a. Employees who have worked a total of twelve hundred (1200) hours since their last anniversary date shall qualify for a full vacation. Employees working less than twelve hundred (1200) hours since their last anniversary date shall receive a pro-rated vacation in accordance with j. below.

b. Overtime shall be computed as a part of the qualifying hours for vacation. Employees must not work during their vacation.

c. Employees are eligible for vacation as follows:

Years of Service	Vacation Hours	Days
1	48	6
2	64	8
3-4	80	10
5-9	120	15
10-19	160	20
20 and after	200	25

d. Employees shall receive their vacation pay on their anniversary date and vacation time shall be scheduled according to g. below. Vacation pay is to be paid at the straight time rate in effect at the time the vacation is paid.

e. Vacation selection shall remain posted year round.

f. Employees on lay off, off due to illness or industrial accident, discharged, or who quit, shall have their vacation pay pro-rated on the following basis:

All Hours Worked

	≥ 30	≥ 60	≥ 90	≥ 120	≥ 150	≥ 180	≥ 210	≥ 240	Max. vac. pay not to exceed
0-1 yr	1	2	3	4	5	6	7	8	6 day
2-3 yrs	1½	3	4½	6	7½	9	10½	12	8 day
3-4 yrs	2	4	6	8	10	12	14	16 day	10 day
5-10 yrs	3	6	9	12	15	18	21	24	15 day
10-20 yrs	4	8	12	16	20	24	28	32	20 day
Over 20 yrs	5	10	15	20	25	30	35	40	25 day

g. *Selection and Posting*

The Employer shall post a list on the bulletin board, not later than February 15 of each year, for employees to sign up for their vacation period.

Vacation list shall be posted by plant not later than February 15th of each year. For choice of vacations, once a vacation list is posted, one week is allowed for

the first twenty-five percent (25%) on the seniority list; one week allowed for the second twenty-five percent (25%) on the seniority list; one week allowed for the third twenty-five percent (25%) on the seniority list; and one week allowed for the fourth and final twenty-five percent (25%). Those not signing up in the correct quarter, shall lose their choice of vacation period and must take what is left. The Employer shall select the time of an employee's fifth (5th) week of vacation.

Not more than ten percent (10%) of the work force shall have vacation at the same time unless permitted by the Employer. However, those plants with more than ten (10) workers shall allow a minimum of two (2) workers to take vacation at the same time.

An employer and an employee may agree on a change in the vacation period of such employee after the vacation schedule has been posted, provided it does not affect the vacation period of any other employees on the vacation schedule.

h. In the, event an employee takes five (5) or more vacation days during a month and did not work eighty (80) or more hours in that same month to qualify for health and welfare coverage, he may request the Employer report the vacation hours for health and welfare purposes. The employee is required to complete a "Vacation Hours for Health and Welfare" form available from his Supervisor.

SECTION 11—BENEFIT PROVISIONS

HEALTH AND WELFARE

Effective May 1, 2004 (payable in June), the Employer shall contribute to the Teamsters Benefit Trust Fund Plan for Plan I eight hundred sixty dollars ($860) per month for each employee who has been paid for eighty (80) hours or more during the calendar month. Any increase above this amount shall be according to Section 8.

Employees who are laid off due to lack of work (and did not work eighty (80) hours or more during the calendar month in which lay-off occurred), illness or on-the-job injury may be eligible for three (3) months of extended coverage. The Employer shall continue to pay the monthly contribution for health and welfare on employees who have been employed for at least six (6) Months and have qualified for coverage for at least six (6) months under Teamsters Benefit Trust Fund for Plan I by having worked eighty (80) hours or more each month.

A qualified employee shall not be eligible for more than three (3) months of extended coverage . In any twelve (12) month period irrespective of the number, frequency, and length of lay-off, illness or on-the-job injury. It is further understood that the extended coverage referred to above applies only in case of lay-off for lack of work and does not apply in cases of voluntary quit or discharge for cause. In order to be eligible, the employee involved must contact and inform the Employer of his/her availability for work each week.

RETIREE HEALTH AND WELFARE

Effective 5/1/2004 payable in [payable in following month], the Employer shall contribute to the Teamsters Benefit Trust Retirement Security Plan an amount of one hundred forty-seven dollars and thirty-one cents ($147.31) per month for each employee who has been paid for eighty (80) hours or more during the calendar month. If there is an increase in the contribution rate, the Union may elect to allocate the necessary amount from the wage and fringe benefit increases effective January 1 or June 1. In the event there is an increase in the Retiree Health and Welfare premium after the January 1 or June 1 increase has been allocated, the straight-time rate shall be reduced to cover the increase. One hundred seventy-three (173) hours per month shall be used in calculating a conversion from dollars per month to cents per hour for health and welfare purposes.

PENSION

Effective May 1, 2004 (payable in June for May hours worked), the contribution to the Western Conference Teamsters Pension Trust Fund (W.C.T.P.T.F.) shall be increased twenty cents ($.20) per hour to provide the Program For Enhanced Early Retirement (PEER/84). This contribution shall be paid on the same basis as contributions for the basic plan. The total contribution. to the W.C.T.P.T.F. shall be $3.23 per hour ($3.03 + $.20 = $3.23). The contribution required to provide the Program For Enhanced Early Retirement will not be taken into consideration for benefit accrual purposes under the Plan. The additional contribution for the PEER/84

must at all times be 6.5% of the basic contribution and cannot be decreased or discontinued at anytime.

Effective May 1, 2004—$3.23 per hour (plus any allocation of $1.81 increase)

The annual maximum contribution for each employee shall be two thousand eighty (2,080) hours.

Time paid for but not worked, such as holidays, vacation time, sick leave, funeral leave, Jury duty and show-up time, shall be considered as time worked for the purposes of this paragraph. Contributions shall be made on overtime hours.

SUPPLEMENTAL INCOME PLAN

The Employer covered by this Agreement shall contribute the amount stated below to the Supplemental Income Trust Fund for the account of each employee working under this Agreement for each hour worked. For the purpose of this section, "hours worked" shall only include all actual hours worked, including shift differential, overtime, show-up time and pay for half and full days.

Effective May 1, 2004 - $3.53 per hour
(plus any allocation of $1.81 increase)

Payments to the Supplemental Income Trust Fund shall be made to the Northwest Administrators, Inc. Withdrawals of funds shall be based on the terms of the Trust Fund document.

BENEFIT PROVISIONS ADMINISTRATION

The total amount due for each calendar month as provided in Section 11 - Pension and Supplemental

income Plan, shall be, remitted in a lump sum not later than the tenth day of the following month. The Employer agrees to abide by such rules as may be established by the Trustees of said Trust Funds to facilitate the prompt and orderly collection of such amounts, and the accurate reporting and recording of such amounts paid on account of the employees. Failure to make the payments herein provided, within the time specified, shall be a breach of this Agreement

The Employer recognizes the Trustees of the aforesaid Trusts as their agents and representatives on the Board of Trustees for the purpose of maintaining and administering the benefits provided for herein.

The liability of the Employer for payments herein provided shall be limited to payments on behalf of his/her own employees.

Delinquent Employers

In the event the Employer covered by this Agreement is delinquent thirty (30) days in the payment of contributions to the Health and Welfare, Pension, and/or any other trust funds provided in this Agreement, it shall not be a violation of this Agreement, so long as such delinquency continues, if the Union withdraws the employees who are subject hereto from the performance of any work for the Employer and thereafter (if such employees are replaced) takes such economic action as is deemed necessary until such delinquent payments are made; and such withdrawal or economic action shall not be considered a strike or work stoppage within the tens. of this Agreement, provided that the Union gives the

delinquent Employer seventy-two (72) hours written notice of its intention. The full cost of any legal or court action, including any reasonable attorney's fees taken, is to be paid by the delinquent Employer. Whether or not any such action is taken, the delinquent Employer shall be liable to employees for any and all benefits which the employees would have received if the Employer had not been delinquent in the payment of such contributions.

SECTION 12—D.R.I.V.E.

The Employer agrees to deduct from the paycheck of all employees covered by this Agreement voluntary contributions to DRIVE. DRIVE shall notify the Employer of the amounts designated by each contributing employee that are to be deducted from his/her paycheck on a weekly basis for all weeks worked. The phrase "weeks worked" excludes any week other than a week in which the employee earned a wage. The Employer shall transmit to DRIVE National Headquarters on a monthly basis, in one check, the total amount deducted along with the name of each employee on whose behalf a deduction is made, the employee's social security number and the amount deducted from that employee's paycheck. The international Brotherhood of Teamsters shall reimburse the Employer annually for the Employer's actual cost for the expenses incurred in administering the weekly payroll deduction plan.

The Employer will recognize authorization for deductions from wages, if in compliance with state law, to be transmitted to the Union or to such other organization as the Union may request if mutually agreed to. No such authorization shall be recognized

if in violation of state or federal law. No deduction shall be made which is prohibited by applicable law.

All disputes arising from this subsection shall be resolved in accordance with the grievance procedure provided in Section 20.

SECTION 13 - SUPPLEMENTAL DUES

Effective May 1, 2004 (payable in June), upon authorization as required by law, the sum of twenty cents ($.20) per hour for each hour worked or compensated shall be deducted from the employee's weekly paycheck as Supplemental Dues. In implementing the foregoing the parties have established the Construction Teamsters Health and Welfare Fund for Northern California as agent for the purpose of receiving and holding written authorizations and for receiving, holding and distributing such Supplemental Dues. All Supplemental Dues received by this Trust Fund for which no signed authorization exists shall be immediately returned to the Employer. All deductions made pursuant to this section shall be noted on the employee's statement of earnings.

The Supplemental Dues referred to above shall be transmitted to the Construction Teamsters Health and Welfare Trust Fund for Northern California concurrently with but not as a part of the Employers monthly Health and Welfare contributions provided in Section 11 of this Agreement. Any delinquency in the payments of this Supplemental Dues shall be subject to the same liquidated damage, interest and other delinquency provisions applicable to contributions to the Construction Teamsters Health and Welfare Trust Fund for Northern California as

provided in Section 11 of this Agreement, and III of the Subscriber Agreement.

The Union shall be responsible for furnishing the written authorization referred to herein. All costs incidental to receipt, administration and remittance of the Supplemental Dues shall be borne solely and entirely by the Union signatory hereto.

SECTION 14 · SICK LEAVE

Every employee covered by this Agreement who has been continuously employed by the Employer for a period of at least one (1) year, shall thereafter be entitled to six (6).days (forty-eight [48] straight time hours) sick leave with pay each year the employee qualifies. An employee shall have been "continuously employed" for one (1) year for the purpose of eligibility for sick leave, after working twelve hundred (1200) straight time hours in the Immediately preceding twelve month period. In no event shall an employee be eligible for any more than six (6) days sick leave (forty-eight [48] straight time hours) with pay during any sick leave anniversary year. Such leave shall be pro-rated on the basis of one day for each two hundred and forty (240) hours as provided in Section 10 of this Agreement.

Such sick leave with pay shall be applicable only in cases of illness or accident of the employee, or to care for a sick child, parent, spouse or domestic partner. In cases of apparent abuse the Employer may require a doctor's certificate or other reasonable proof of illness. Sick leave shall be paid in the following manner:

a. The sick leave benefit allowance for illness or accident shall commence with the first work day's absence. Regular employees shall be eligible for sick leave pay if they are scheduled for work that day.

b. If any employee with two (2) or more years of employment uses less than six (6) days (forty-eight [46] straight. time hours) sick leave during his/her employment year, then the employee carries the six (6) days [48] straight time hours) sick leave or any unused portion of sick leave over to the succeeding employment year; provided, however, that the total maximum accumulative sick leave allowance shall not exceed twenty (20) days (one hundred sixty [160] straight time hours) in any one year

c. In industrial injury cases, or non-industrial injury or sickness cases, Workers Compensation or Disability Insurance benefits shall be paid separately; but in the event Workers Compensation payments or Disability Insurance payments cover all or part of the period during which sick leave is paid, the sum of the two shall not exceed the sick leave allowance herein provided.

d. Where the disabled employee is also eligible for and is receiving Unemployment Compensation Disability benefits or Workers Compensation' benefits, the sick leave benefits outlined in this Agreement shall be paid separately and shall be integrated with the Unemployment Compensation Disability benefits or Workers Compensation benefits. The total benefits received shall not exceed the normal straight time earnings of the employee. Such payments are to be made on an integrated basis and the accrued sick leave benefits of the

employee shall be charged only to the extent that actual payments are made by the Employer.

e. An employee shall be eligible to cash-out up to three (3) days of unused sick leave above the maximum accumulative sick leave allowance of twenty (20) days at the rate of one hundred ($100) per day. The employee shall notify the Employer in writing of such request within fifteen (15) days of the employee's anniversary date.

Any employee who abuses sick leave may be subject to Section 19.

SECTION 15 - JURY DUTY

When an employee who has established seniority is unable to report for work on his/her assigned shift by reason of jury duty, the employee will, upon furnishing written proof of such service, be paid the difference between the jury pay, if any, and the amount the employee would have been paid if the employee had worked an eight hour day, with a maximum of thirty-five (35) days per year, at the appropriate rate of pay if scheduled to work.

Employees who are called for examination for jury duty or who serve on jury duty by being impaneled in a jury box and actively serving as a juror, shall be reimbursed the difference between jury pay, if any, and their straight time pay lost under the qualifications set forth below:

a. Employees called for jury duty or examination and excused by the court prior to 12:00 noon shall return to work for the balance of their day shift and shall be paid the difference between the jury pay or

examination pay, if any, and their straight time pay lost.

b. Employees in a layoff status shall not be eligible for pay under this section:

SECTION 16 · LEAVES OF ABSENCE

a. *Approved Leave.* An employee desiring leave of absence from his/her employment shall secure written permission from both the Employer and the Union Executive Board. Except as otherwise provided in this section, the maximum leave of absence shall be for thirty (30) days and may be extended for like periods. Written permission for such extended periods shall be secured from both the Employer and the Union Executive Board. The first approved leave of absence plus approved extended leaves of absence shall not exceed a maximum time period of twelve (12) months. During an approved leave of absence the employee shall not engage in gainful employment. Leaves of five (5) days or less do not require Union approval.

An employee who is unable to work because of injury on the job shall be deemed to be on leave of absence. However, nothing contained herein shall be in conflict with the applicable seniority vacation provisions in this Agreement covering injured employees.

b. *Effect on Vacations and Holidays.* Time off due to an approved leave of absence other than injury on the job, shall not be accumulative for vacation purposes. All regular employees off the job due to injury on the job shall accumulate vacation rights, holiday pay, and sick leave credit beginning

with the date of injury on the job and continuing to the end of the month.

SECTION 17 · FUNERAL LEAVE

Employer agrees to pay employee at his/her regular straight time rate of pay for time lost from work up to but not to exceed three (3) days of not more than eight (8) hours per day to attend the funeral as a result of the death of the employee's spouse, domestic partner, parent, grandparent, mother-in-law, father-in-law, child, grandchild, brother or sister (to include foster or step).

SECTION 18 · MANAGEMENT

The management of the Employer's plant and the direction of the working forces, including the right to hire, suspend or discharge for proper cause, or transfer, and the right to relieve employees from duty because of lack of work, or for other legitimate reasons, except as may be limited by the provisions of this Agreement, is vested exclusively in the Employer, provided that these rights will not be used for the purposes of discrimination against any employee for union activity.

SECTION 19 · DISCHARGE/SUSPENSION

No employee shall be discharged or suspended without just cause. In the event of discharge or suspension without just cause, the employee may be reinstated with payment for all time lost.

A written notice of discharge or suspension shall specify the reason for discharge or suspension and shall be served upon the employee and the Union

within forty-eight (48) hours after the discharge or suspension occurs. Discharges or suspensions to be effective must occur not more than ten (10) working days after the incident or ten (10) days from the day the Employer becomes aware or should have become aware of the incident providing the basis for the discharge or suspension. The forty-eight (48) hours here referred to are exclusive of Saturdays, Sundays and holidays.

If an employee Is given a warning notice rather than a discharge or suspension, such warning shall be in writing.

SECTION 20 - GRIEVANCE PROCEDURE

All disputes arising under this agreement shall be resolved in accordance with the following procedure:

a. Employees may, at their discretion, take up any dispute with the local management. However, any format dispute shall be taken up by the Union with the Employer.

b. If the Union and the Employer are unable to resolve the dispute, it shall be referred to Federal Mediation and Conciliation Service for Mediation.

c. The Federal Mediation and Conciliation Service Mediator shall establish meeting dates, rules of procedure governing its proceedings, and adopt any forms necessary to administer the procedures prescribed by this section. Actions by the Mediator shall be within the scope and terms of this agreement.

d. The Mediator shall first attempt to reach agreement between the parties after first conducting a hearing in which each party shall present its factual case. If the parties are unable to reach voluntary agreement on the matter, the Mediator shall issue an Advisory Opinion. The Advisory Opinion shall Indicate which party would prevail if the Mediator had made a binding decision.

e. If the dispute is referred to arbitration by either party, the parties agree that the Arbitrator shall be either Franklin Silver or another Arbitrator mutually agreed upon by both parties. The filing of a request for arbitration must be made within ten (10) days written notice to the other party (after issuance of an Advisory Opinion by the Mediator). Both Arbitrators will be asked to provide their first available dates for a hearing. The Arbitrator with the earliest date shall be designated for the first case submitted under this procedure; thereafter, the Arbitrators will be rotated, provided that in the event the designated Arbitrator does not have an available date within sixty (60) days of the referral, the other Arbitrator shall be used if he has dates within the sixty (60) day period. The parties shall develop a system to keep track of the order of Arbitrator selection. Pending a decision by the impartial Arbitrator, work shall be continued in accordance with the provisions of this agreement.

f. Decisions of the impartial Arbitrator shall be within the scope and terms of this agreement and shall be final and binding upon all parties hereto, provided such decision is specifically limited to the matter submitted and does not amend any provisions of this agreement.

g. The expenses of employing an impartial Arbitrator including the cost of a court reporter shall be borne equally by the parties. However, should the Arbitrator and Mediator arrive at the same decision regarding the prevailing party, the payment of costs will be in accordance with paragraph h. below.

h. The non-prevailing party in the arbitration shall pay to the prevailing party all of the prevailing party's costs of the arbitration, including but not limited to, attorney's fees, arbitrator's fees, reporter's fees, transcripts and witness fees. In the event a dispute arises between the parties as to the identity of the prevailing patty of any of the costs to be paid or any other matter relating to this provision, said dispute shall be resolved by thc Arbitrator who shall retain jurisdiction for such purposes.

i. Other than the Arbitrator's use in deciding if paragraph h. applies, the Mediator's Advisory Opinion shall be non-admissible and shall be treated as confidential settlement discussions between the parties.

j. It is understood and agreed by and between the parties that the following classes of disputes are not subject to the provisions of this section and that, except as provided in this agreement, each party shall have the right to take such legal and economic action as it may deem proper to resolve said disputes:

1. Disputes arising out of the failure of the Employer to meet the payroll for employees covered by this agreement;

2. Disputes arising because a payroll check issued by the Employer is dishonored; and

3. Disputes arising out of Section 1 · Recognition, c.

k. Proceedings pursuant to this section relating to discharges or suspensions must be brought to the attention of the Employer and the Union not more than ten (10) days after the alleged violation was committed. All other grievances shall be brought to the attention of the Employer and Union within sixty (60) days of the occurrence of the alleged violation.

In computing the ten (10) day or sixty (60) day period, the day on which the alleged violation was committed is not to be included. The last day of the period so computed is to be inducted, unless it is a Saturday, Sunday or holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday or holiday.

SECTION 21 · UNION ACTIVITY

a. No employee shall be discharged or discriminated against for Union activity or for representing the interests of the Union.

b. The Employer recognizes the right of the Union to designate plant stewards and alternates from the Employers seniority list.

c. The authority of the stewards and alternates so designated by the Union shall be limited to and shall not exceed the following duties and activities:

1. The investigation and presentation of grievances with his/her Employer or the designated company representative in accordance with the provisions of the collective bargaining agreement;

2. The transmission of such messages and Information which shall originate with, and are authorized by the Union or its officers, provided such messages and information:

   i. Have been reduced to writing, or

   ii. If not reduced to writing, are of a routine nature and do not involve work stoppages, slow downs, refusal to handle goods, or any other interference with the Employers business.

d. Stewards and alternates have no authority to take strike action, or any other action interrupting the Employers business, except as authorized by official action of the Union.

e. The Employer recognizes these limitations upon the authority of stewards and their alternates, and shall not hold the Union liable for any unauthorized acts. The Employer in so recognizing such limitations shall have the authority to impose proper discipline, including discharge, in the event the steward has taken unauthorized strike action, slow down or work stoppage in violation of this Agreement.

SECTION 22 · STRIKES AND LOCKOUTS

There will be no strikes, including unfair labor practice strikes, sympathy strikes, slowdowns, stoppages of work or picketing by the Union or employees and there will be no lockouts by the Employer during the term of this Agreement, except as otherwise provided for herein. However, it will not be considered a violation of this Agreement and an employee will not be permanently replaced for refusing to pass through or work behind a lawful primary picket line established at any Employer property by a union, which picket line has been sanctioned by the Joint Council of Teamsters No. 7, and also approved by the Bay Area Building Material Teamsters Committal, after fifteen (15) full working days of both withholding services and primary picketing at the Employer facility.

In addition, it will not be considered a violation of this Agreement and an employee will not be permanently replaced for honoring a lawful primary picket line sanctioned by Joint Council of Teamsters No. 7 or the Building Trades Council and/or the Central Labor Council, provided, however, picket lines sanctioned or authorized above must also be approved by the Bay Area Building Material Teamsters Committee, at any non-Employer property, except when the following situations arise at such non-Employer property: (1) a reserved gate system has been established; or (2) the Union has failed to provide the Employer with written notice of the lawful primary labor dispute twenty-four (24) hours before any employee refuses to enter property when the picket line has been established; or (3) the picket line has been established by any union with a

primary labor dispute with the Employer covered by this Agreement

The Union and the employees pledge that they will do everything within their authority to prevent the Employer and its employees from losing any work whatsoever to non-union or other competitors. If, after thorough scrutiny and consideration, strike sanction and primary pickets are granted, the Union will provide the Employer with as much notice as provided for in Item (2) in the above paragraph.

In the event that any employee or group of employees in the bargaining unit covered by this Agreement engages in any of the activities prohibited by this Section, the Union agrees, upon notice by the Employer, immediately to take affirmative action and direct such employee or group of employees to cease such activity and resume work immediately.

The protection afforded employees herein shall not apply to jurisdictional disputes concerning work covered by this Agreement.

SECTION 23 · AGREEMENT BINDING UPON PARTIES

This Agreement shall be binding upon the heirs, executors, administrators, successors, purchasers and assigns of the parties hereto.

The Employer shall give written notice of the existence of this Agreement to any purchaser, successor or assignee of the operation covered by this Agreement or any part thereof. The Union shall be notified in writing of any change in operations and

shall be given reasonable opportunity to discuss the matter with the purchaser, successor or assignee before the actual change in operations takes place.

SECTION 24 – GENERAL PROVISIONS

a. *Merger, Lease or Purchase.* Employees when employed by the Employer as a result of the merger, lease or purchase of another firm shall be integrated with the new employer's work force for purposes of vacation credit, health and welfare, pensions, paid holidays and sick leave. The parties hereto shall not use a leasing device to a third party to evade this Agreement.

b. *Physical Examination.* Where the employee is required to take a physical examination by the Employer or as a requirement by law, the Employer shall bear the cost of said examination. Where the Employer requires physical examination, it shall pay for time involved in the examination at the employee's straight time or overtime rate of pay. However, the Employer shall pay for both the examination and the time involved in the examination of new hires. The Union may, if it believes an injustice has been done an employee, have said employee re-examined at the employee's expense and the results shall be given weight in the determination of the employee's physical ability.

c. *Country Work.* Drivers and helpers assigned to country work shall be paid at the regular schedule while in actual service and shall receive in addition $15.00 road expense while out of town fifteen (15) hours or more. They shall receive an additional $20.00 for lodging if out of town overnight.

d. *Starting Point.* Period of working time shall be from the time driver commences to check the equipment, start the truck or tractor at the starting point, until the time the driver returns to the same starting point, unless the employee is working under "country work."

e. *Uniforms/Protective Gear.* Employer agrees to furnish free of charge to their employees any and all required uniforms, caps, and/or hats, boots, oil skins, rain gear, or hard hats. The upkeep and laundry of required uniforms shall be borne by the Employer. Rubber gloves and eye protection shall be made available to employees cleaning trucks with chemicals.

f. *Access to Premises.* The Business Agent of the Union shall have access to the Employer's premises during working hours for the purpose of posting notices, talking to the employees, and collecting due's, provided that such does not interfere with the normal course of work.

g. *Traffic Violations.* The Employer shall be held responsible for the violation of overweight, over-width and defective equipment unless the employee has acted contrary to the instructions of the Employer. Any traffic violations ordered by the Employer resulting in penalty of any kind shall be paid by the Employer. The employee is to be paid normal pay when appearing in court on behalf of the company.

h. *Voting Time.* The Employer shall abide by State Law Section 5699 covering voting time.

i. *Time Records.* The Employer shall provide a proper means of registering reporting and quitting time. Such records shall be accessible to the business representative of the Union during regular working hours. Employees shall punch or mark their own time cards.

j. *Pay Checks, Information.* An employee's pay check stub shall contain an itemized statement showing the breakdown of date, time, hours, overtime hours and all authorized deductions, Unless the employee checks in or put contrary to orders, the Employer shall not alter the employee's recorded time on the time card in any manner without clearing that alteration with the employee and the Union within forty-eight (48) hours.

Pay Checks, Weekly Pay. Each employee shall be paid wages in full each week unless other arrangements are made with the Union. Employees who quit or are discharged shall be paid in accordance with the law of the State of California.

k. *Garnishments.* In the event of notice to an Employer of a garnishment or impending garnishment, the Employer shall not take any disciplinary action against the employee for a period of seventy-two (72) hours for the first three garnishments, during which seventy- two (72) hour period the employee shall adjust the same. After three garnishments, disciplinary action including discharge may be taken if an employee fails to adjust the matter the Employer's. past practice shall prevail. Any action taken by the Employer will be in conformance with the state and/or federal laws.

l. *Bulletin Boards.* The Employer shall maintain a bulletin board in a prominent location in the plant upon which board the Union shall have the privilege of posting necessary notices pertinent to the conduct of union business.

m. *Telephone Calls.* All employees shall be reimbursed for money spent for telephone calls involving company business. Particulars of all phone calls must be itemized and settled weekly.

n. *Supervisory Personnel.* No supervisory personnel shall operate fork lifts and related equipment in a yard, unless they are members of a Union covered by this Agreement.

o. *Bonds.* No employee shall be required by the Employer to deposit a cash bond with the Employer for any reason whatsoever.

p. *Attendance at Company Meetings.* No employee shall be required to attend a company meeting on employee's own time. An employee shall receive pay for attending mandatory safety meetings for the duration of the meeting with no less than two (2) hours at the straight-time rate of pay. The starting time of safety meetings may begin at 5:00 a.m. In addition, the Employer may provide one day (maximum of eight hours) of customer-related training during the calendar year with employees paid at their straight-time rate of pay for attendance. If held on Saturday, the employee shall be paid the straight-time rate of pay until completion of forty (40) hours in the workweek.

q. *Drinking Water and Sanitary Facilities.* The Employer shall furnish and maintain sanitary

facilities. The Employer shall also provide drinking water.

r. *Maintenance of Standards.* No employee receiving a higher rate of pay or superior conditions than provided in the contract shall receive any reduction in pay or modification of conditions during the life of the contract.

s. *Military Duty.* No employee shall lose seniority rating or credit by reason of being required to perform military duty during the term of this Agreement, and after returning, employee shall be restored to the position which was held at the time of leaving for such duty, provided employee is physically fit to perform the work.

t. *Return After Injury.* Whenever an employee who has been off work as a result of an injury or illness, work connected or not, is released by the doctor who is treating the employee to return to work, the Employer shall return the employee to the former job if in operation or to the first available job for which the employee is qualified. In such cases, the doctor shall be a qualified specialist as may be required.

u. *Clean Chutes.* If no time is given the driver by the Employer to wash chutes and rear of Mixer, the Employer shall have full responsibility for damage done as a result.

v. *Emergencies.* The Union will cooperate with the Employer in the event of an emergency. An emergency is defined as an accident, illness or failure of an employee to report to work, a mechanical breakdown including a power failure, or

energy curtailment or an Act of God that affects the processing or loading of materials.

w. *Operating Requirements.* No driver shall be required to use any equipment which is known to be defective. Employees shall report defects in equipment on a triplicate form to be provided by the Employer; one copy shall be retained by the employee, one by the Employer and one by the mechanic.

x. *Collections.* No employee shall deliver material without collecting for same unless the Employer assumes full responsibility for each collection. The employee shall turn in cash and/or checks after returning from C.O.D. deliveries and the Employer shall provide a written receipt for same.

y. *Drugs and Alcohol.* It is recognized by both parties that there is a social problem relative to the abuse of drugs and alcohol, and therefore agreed that employees will comply with the DOT (Department of Transportation) regulations.

z. *Safety Cooperation.* The Union shall cooperate with the Employer in the carrying out of all such Employer's safety measures and practices for accident prevention not in conflict with the provisions of this Agreement and in carrying out and adhering to all of the applicable state and federal safety laws.

aa. *Hazardous Waste Jobsites.* If an employee is required to work on a hazardous waste jobsite, the Employer agrees to make available all required personal protective equipment. Personal protective

equipment shall exceed minimum standards if the better quality equipment is available at a reasonable cost to the Employer.

SECTION 26—MARKETING CONDITIONS

The parties to this Agreement recognize the necessity of assuring the competitive position of the parties within the industry during the term of this Agreement. Consistent with that recognition, the parties will continually monitor the effectiveness of this Agreement relative to specific geographic or market areas and will endeavor, by mutual agreement to initiate such modifications to the Agreement during its term as may be necessary to assure the work opportunities of the employees and the competitive position of the Employer, provided however, any such geographic or market area modification, addendum or agreement which modifies this Agreement, in part or in whole, shall be subject to the ratification and approval of the affected membership in the geographic or market area to which the Agreement would apply. Failure by the membership to ratify any such agreement and/or modification, shall nullify it. It is further agreed that the Employer shall be precluded from unilaterally implementing any said agreement(s), modification(s) or addenda.

SECTION 26—EMERGENCY REOPENING

In the event of the declaration of war by Congress of the United States during the life of this Agreement, either party may reopen the same upon sixty (60) days' written notice and request renegotiations of matters dealing with wages and hours. Upon failure of the parties to agree in such negotiations; either

party shall be permitted all lawful economic recourse to support their request for revisions. If governmental approval of revisions should become necessary, all parties will cooperate to the utmost to attain such approval. The parties agree that the notice provided herein shall be accepted by all parties as to compliance with the notice requirements of applicable law, so as to permit economic action at the expiration thereof.

SECTION 27—TERM OF AGREEMENT

This Agreement shall remain in effect from May 1, 2004, until midnight April 30, 2008, and may be renewed thereafter either as is or with changes or amendments; but, if neither party to this Agreement, prior to sixty (60) days before the expiration date, notifies the other party in writing of its desire to rescind or make any changes or amendment in said Agreement then said contract will automatically be extended and renewed.

FOR THE UNION:	FOR THE EMPLOYER:
TEAMSTERS UNION	GRANITE ROCK
LOCAL 287	COMPANY
/s	/s
George Netto	Shirley Ow
12/17/04	December 14, 2004
Date	Date

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
AUG 27 2009
OFFICE OF THE CLERK

NO. 08-1214

In The Supreme Court of The United States

GRANITE ROCK COMPANY,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS & TEAMSTERS LOCAL 287,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

ARTHUR R. MILLER
Of Counsel
NEW YORK UNIVERSITY
SCHOOL OF LAW
40 Washington Square South
Vanderbilt Hall 409D
New York, NY 10012
Telephone: 212.992.8147

GARRY G. MATHIASON
Counsel of Record
ALAN S. LEVINS
ADAM J. PETERS
RACHELLE L. WILLS
SOFIJA ANDERSON
LITTLER MENDELSON
650 California Street
20th Floor
San Francisco, CA 94108
Telephone: 415.433.1940

August 27, 2009

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

BOTH 42XLVB

983

I. QUESTIONS PRESENTED FOR REVIEW

A. Does a federal court have jurisdiction to determine whether a collective bargaining agreement was formed when it is disputed whether any binding contract exists, but no party makes an independent challenge to the arbitration clause apart from claiming it is inoperative before the contract is established?

B. Does Section 301(a) of the Labor Management Relations Act, which generally preempts otherwise available state law causes of action, provide a cause of action against an international union that is not a direct signatory to the collective bargaining agreement, but effectively displaces its signatory local union and causes a strike breaching a collective bargaining agreement for its own benefit?

CORPORATE DISCLOSURE STATEMENT

Granite Rock Company has no parent company, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

PAGE

I. QUESTIONS PRESENTED FOR REVIEW i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES ix

OPINION BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

II. STATEMENT OF THE CASE 2

III. PROCEDURAL HISTORY 6

A. District Court Proceedings 6

B. The Ninth Circuit Decision 9

IV. SUMMARY OF ARGUMENT 10

A. Federal Courts Have Authority To Decide Disputes Over Initial Contract Formation Issues 10

TABLE OF CONTENTS
(CONTINUED)

PAGE

B. A Section 301(a) Action And Remedy Should Be Recognized To Address Parent Unions' Inducement Of Strikes Violating Bargained-For No-Strike Provisions In Labor Contracts 12

V. THE FEDERAL COURT, NOT THE ARBITRATOR, HAS THE AUTHORITY TO DETERMINE WHETHER A BINDING CONTRACT CONTAINING AN ARBITRATION PROVISION WAS INITIALLY FORMED 15

A. It Is Axiomatic That There Can Be No Duty To Arbitrate Absent A Contract Between The Parties 17

B. Granite Rock Did Not "Clearly And Unmistakably" Agree To Arbitrate The Issue Of Contract Formation..... 23

TABLE OF CONTENTS
(CONTINUED)

PAGE

C. This Court's Decisions In *Buckeye Check Cashing* and *Prima Paint Corp.* Do Not Address Courts' Authority To Resolve Whether A Contract Was Created 25

D. The Decision Below, If Left Undisturbed, Will Discourage Parties From Negotiating And Agreeing To Arbitration Language 27

VI. A NON-SIGNATORY INTERNATIONAL UNION THAT DISPLACES ITS AFFILIATED LOCAL AND CAUSES A STRIKE VIOLATING A COLLECTIVE BARGAINING AGREEMENT CANNOT CLOAK ITSELF WITH IMMUNITY FROM SECTION 301(A) OF THE LABOR MANAGEMENT RELATIONS ACT 31

A. The Plain Language Of Section 301(a) Establishes Jurisdiction Over The IBT As This Case Involves A "Violation" Of A Contract "Between" A Labor Organization And An Employer 33

TABLE OF CONTENTS
(CONTINUED)

PAGE

B. This Court's Decisions Interpreting Section 301(a) Are Consistent With and Support Recognizing A Cause Of Action Against IBT 35

C. The Legislative History Of The LMRA And Section 301(a) Support A Federal Cause Of Action Against IBT 37

1. Congress Enacted The LMRA To Promote Labor Stability And Prevent The Use Of Economic Force To Resolve Issues Under An Existing Collective Bargaining Agreement 37

2. The Enactment of Section 301(a) Federalized What California Law Already Permitted: Lawsuits Against Labor Organizations For Tortious Inducement/Interference With Contracts As A Cause Of Action 43

TABLE OF CONTENTS
(CONTINUED)

PAGE

D. Section 301(a) Mandates Federal Courts To Fashion Appropriate Common Law Claims And Remedies Primarily Drawing Upon Contract Law But Occasionally Incorporating Other Legal Principles If Needed To Enforce Labor Contracts 45

E. Public Policy Mandates That Granite Rock Have A Remedy Under Section 301(a) For IBT's Direct Violation Of The No-Strike Provision In The Contract..... 54

1. Without a Right To Proceed Under Section 301(a), Granite Rock Would Be Without a Remedy For Egregious Violations Of Its Labor Contract's No-Strike Provision..... 54

TABLE OF CONTENTS
(CONTINUED)

PAGE

2. The Ninth Circuit's Decision Provides International Unions, Like IBT, A Blueprint for Industrial Chaos And Is The Antithesis Of What Congress Intended. 59

VII. CONCLUSION 60

TABLE OF AUTHORITIES

PAGE

CASES

Adams v. Suozzi,
433 F.3d 220 (2d Cir. 2005) 22

Allis-Chalmers Corp. v. Lueck,
471 U.S. 202 (1985) ..... passim

AT&T Technologies, Inc. v. Commc'n Workers of Am.,
475 U.S. 643 (1986) ..... passim

Atkinson v. Sinclair Refining Co.,
370 U.S. 238 (1962) 18

Baylis v. Marriott Corp.,
906 F.2d 874 (2d Cir. 1990) 56

Boys Markets, Inc. v. Retail Clerks Union, Local 770,
398 U.S. 235 (1970) 6

Brown v. Sandimo Materials,
250 F.3d 120 (2d Cir. 2001) 50, 53

Buckeye Check Cashing, Inc. v. Cardegna,
546 U.S. 440 (2006) ..... passim

Buckley v. Trenton Saving Fund Soc'y,
111 N.J. 355 (1988) 48

Buffalo Forge Co. v. Steelworkers of Am., AFL-CIO,
428 U.S. 397 (1976) 58

TABLE OF AUTHORITIES
(CONTINUED)

PAGE

Carbon Fuel Co. v. United Mine Workers of Am.,
444 U.S. 212 (1979) 49

Cedar Coal Co. v. United Mine Workers of Am.,
560 F.2d 1153 (4th Cir. 1977) 6

Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry,
494 U.S. 558 (1990) 35

Childs v. Local 18, Int'l Bhd. of Elec. Workers,
719 F.2d 1379 (9th Cir. 1983) 53

Complete Auto Transit, Inc. v. Reis,
451 U.S. 401 (1981) 6, 57

Deeney v. Hotel & Apartment Clerks' Union,
57 Cal. App. 2d Supp. 1023,
134 P.2d 328 (1943) 43

DelCostello v. Int'l Bhd. of Teamsters, et al.,
462 U.S. 151 (1983) 36, 49

Dep't of the Army v. Blue Fox, Inc.,
525 U.S. 255 (1999) 48

Digicorp, Inc. v. Ameritech Corp.,
262 Wis. 2d 32 (2003) 48

TABLE OF AUTHORITIES
(CONTINUED)

PAGE

Eckard Brandes, Inc. v. Riley,
338 F.3d 1082 (9th Cir. 2003) 49

Eisenberg v. Ins. Co. of N. Am.,
815 F.2d 1285 (9th Cir. 1987) 49

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938 (1995) 15, 19, 27

Gateway Coal Co. v. Mine Workers of Am.,
414 U.S. 368 (1974) 17

Granite Rock Co. v. Int'l Bhd. of Teamsters, Local 287,
546 F.3d 1169 (9th Cir. 2008) 9

Green Tree Financial Corp. v. Bazzle,
539 U.S. 444 (2003) 20, 24

Hines v. Anchor Motor Freight, Inc.,
424 U.S. 554 (1976) 34

Howsam v. Dean Witter Reynolds, Inc.,
537 U.S. 79 (2002) 15, 20, 27

Imperial Ice Co. v. Rossier,
18 Cal.2d 33,
112 P.2d 631 (1941) 44

TABLE OF AUTHORITIES
(CONTINUED)

PAGE

Int'l Ass'n of Machinists & Aerospace Workers, Progressive Lodge No. 1000 v. Gen. Elec. Co., 865 F.2d 902 (7th Cir. 1989) 29

Int'l Bhd. of Elec. Workers AFL-CIO v. Hechler, 481 U.S. 851 (1987) 36, 48, 55

Int'l Bhd. of Elec. Workers, Local 613 v. Fowler Industries, 884 F.2d 551 (11th Cir. 1989) 50, 53

Int'l Union of Operating Engineers, Local 150, v. Flair Builders, Inc., 406 U.S. 487 (1972) 10, 17

Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Hoosier Cardinal Corp., 383 U.S. 696 (1966) 36, 49

Int'l Union, United Mine Workers of Am. v. Covenant Coal Corp., 977 F.2d 895 (4th Cir. 1992) 56

Jimenez v. Quarterman, 555 U.S. ___ (January 13, 2009), 129 S.Ct. 681, 172 L.Ed.2d 475 33

TABLE OF AUTHORITIES
(CONTINUED)

PAGE

John Wiley & Sons, Inc. v. Livingston,
376 U.S. 543 (1964) 15, 17

Johnson v. Anheuser Busch, Inc.,
876 F.2d 620 (8th Cir. 1989) 56

Johnson v. Healy,
176 Conn. 97 (1978) 48

Johnson v. Jones,
515 U.S. 304 (1995) 4

Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheel Corp.,
868 F.2d 573 (3d Cir. 1989) 50

Lamie v. United States Trustee,
540 U.S. 526 (2004) 34

Lingle v. Norge Div. of Magic Chef, Inc.,
486 U.S. 399 (1988) 44

Litton Fin. Printing Div. v. N.L.R.B.,
501 U.S. 190 (1991) 19, 27

Local 159 v. Nor-Cal Plumbing, Inc.,
185 F.3d 978 (9th Cir. 1999) 53

TABLE OF AUTHORITIES
(CONTINUED)

PAGE

Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.,
369 U.S. 95 (1962) 31

Local 472 of United Ass'n of Journeyman and Apprentices v. Georgia Power Co.,
684 F.2d 721 (11th Cir. 1982) 51

Lumley v. Gye,
(J. Crompton) 118 Eng. Rep. 749 (Q.B. 1853) 47

Magerer v. John Sexton & Co.,
912 F.2d. 525 (1st Cir. 1990) 56

Major League Baseball Ass'n v. Garvey,
532 U.S. 504 (2001) 28

Marbury v. Madison,
5 U.S. 137 (1803) 14

Milne Employee's Ass'n v. Sun Carriers,
960 F.2d 1401 (9th Cir. 1991) 37, 56

Nedd v. United Mine Workers,
556 F.2d 190 (3d Cir. 1977) 52

Pakootas v. Teck Cominco Metals, Ltd.,
452 F.3d 1066 (9th Cir. 2006) 4

TABLE OF AUTHORITIES
(CONTINUED)

PAGE

Polo Ralph Lauren, L.P. v. Tropical Shipping & Construction Co., Ltd.,
215 F.3d 1217 (11th Cir. 2000) 49

Prima Paint Corp. v. Flood & Conklin Mfg. Co.,
388 U.S. 395 (1967) ..... passim

Puerto Rico Aqueduct & Sewer Authority v. Constructora Lluch, Inc.,
169 F.3d 68 (1st Cir. 1999) 49

Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.,
380 U.S. 255 (1965) 53

Sandvik AB v. Advent Int'l Corp.,
220 F.3d 99 (3d Cir. 2000) 20, 22

Schneider Moving & Storage Co. v. Robbins,
466 U.S. 364 (1984) 28

Sheet Metal Workers Int'l Ass'n, Local No. 359 v. Arizona Mech. & Stainless, Inc.,
863 F.2d 647 (9th Cir. 1988) 50, 53

Smith v. Evening News Ass'n,
371 U.S. 195 (1962) 33, 45, 52

TABLE OF AUTHORITIES
(CONTINUED)

PAGE

South Prairie Const. Co. v. Local No. 627, Int'l Union of Operating Engineers, AFL-CIO, 425 U.S. 800 (1976) 53

Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 28

Stephan v. GAF Corp., 242 Kan. 152 (1987) 48

Teamsters Local 287, Int'l Bhd of Teamsters and Granite Rock Co., 347 NLRB No. 32 (2006) 9

Teledyne, Inc. v. Kone Corp., 892 F.2d 1404 (9th Cir. 1989) 10

Textile Workers Union of Am. v. Lincoln Mills, 353 U.S. 448 (1957) ..... passim

Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Auto Aerospace & Agric. Implement Workers of Am., 523 U.S. 653 (1998) 13, 33, 34, 36

The John G. Stevens, 170 U.S. 113 (1898) 48

TABLE OF AUTHORITIES
(CONTINUED)

PAGE

United Paperworkers Int'l Union v. Misco, Inc.,
484 U.S. 29 (1987) 28

United Steelworkers of Am. v. Rawson,
495 U.S. 362 (1990) 55

United Steelworkers of Am. v. Warrior & Gulf Nav. Co.,
363 U.S. 574 (1960) 10, 29

Vaca v. Sipes,
386 U.S. 171 (1967) 49, 52

Wilkes-Barre Publ'g Co. v. Newspaper Guild of Wilkes-Barre, Local 120,
647 F.2d 372 (3d Cir. 1981) 51

Woodell v. Int'l Bhd. of Elec. Workers, Local 71,
502 U.S. 93 (1991) 34

Xaros v. U.S. Fidelity & Guaranty Co.,
820 F.2d 1176 (11th Cir. 1987) 51

STATUTES

29 U.S.C. § 141(b) 38

29 U.S.C. § 185(a) (Section 301(a)) ..... passim

TABLE OF AUTHORITIES
(CONTINUED)

PAGE

Cal. Code Civ. Proc. § 388 43

OTHER AUTHORITIES

1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947 (1948) ..... passim

Archibald Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482 (1959) 28

H.R Min. Rep. No. 80-245, at 95 (1947) 42

H.R. 3020, 80th Cong., at 64 (1947) 40

H.R. REP. NO. 80-245, at 3-4 (1947) 38

H.R. REP. NO. 80-510, at 23 (1947) 41

Rebecca Bernhard, *The Three Faces Of Eve: Tortious Interference Claims In The Employment-At-Will Setting*, 86 Minn. L. Rev. 1541 (2002) 48

S. 1126, 80th Cong., at 53 (1947) 41

S. REP. NO. 80-105, at 16-18 (1947) 41, 43, 44

PETITIONER'S BRIEF

OPINION BELOW

The Ninth Circuit opinion, *Granite Rock Local 287*, appears at 546 F.3d 1169 (9th Cir. 2008). The opinions of the District Court regarding arbitration and Section 301 jurisdiction are unreported.

JURISDICTION

The Ninth Circuit entered its opinion on October 22, 2008. The circuit court denied rehearing *en banc* on December 30, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 301(a) of the Labor-Management Relations Act ("LMRA") provides:

> Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

II. STATEMENT OF THE CASE

Since 1900, Granite Rock has been in the business of producing concrete and other building materials. It has facilities throughout Northern California, employs about 800 employees, and maintains fifteen separate labor contracts with more than five unions, including Teamsters Local 287 (the the "Local," or "Local 287").[1] Granite Rock has been a union employer for more than 70 years.[2]

On July 2, 2004,[3] in the midst of a strike, Granite Rock (also the "Company" or "Petitioner") and Local 287 reached a "tentative agreement" for a successor collective bargaining agreement after an all-night bargaining session. (JA 377.) Granite Rock and the Union agreed the tentative agreement would not be binding unless and until it was ratified by bargaining unit employees. (*Id.*) Local 287's business agent, George Netto, promised to hold a ratification vote later that morning and recommend ratification. (JA 310.)

Within hours of the all-night bargaining session, the Union took down its pickets and held a membership vote.[4] (JA 377.) The bargaining unit voted to accept the tentative agreement. (*Id.*) Several employees told Granite Rock the agreement was ratified (the "Agreement"), and the strike was

---

[1] Trial Transcript ("Tr. Trscpt."), Vol. 1 at 113-14, Vol. 2 at 8-9.

[2] Tr. Trscpt., Vol. 2 at 8-9.

[3] All dates refer to 2004, unless otherwise stated.

[4] The parties' prior agreement expired on April 30, 2004. The Union had been on strike and had been picketing Granite Rock since early June.

over. (JA 133-38.) The new Agreement contained a multi-faceted no-strike provision[5] and a provision for the arbitration of disputes "arising under" the Agreement.[6] It also defined the scope of the arbitrator's authority, stating that "[d]ecisions of the impartial Arbitrator shall be within the scope and terms of the agreement and shall be final and binding . . . provided such decision . . . does not amend any provisions of this agreement." (JA 434.)

Throughout negotiations, the International Brotherhood of Teamsters (the "IBT" or

---

[5] Section 22 of the parties' Agreement is entitled "Strikes And Lockouts." It provides:

> There will be no strikes, including unfair labor practice strikes, sympathy strikes, slowdowns, stoppages of work or picketing by the Union or employees and there will be no lockouts by the Employer during the term of this Agreement, except as otherwise provided for herein. However, it will not be considered a violation of this Agreement and an employee will not be permanently replaced for refusing to pass through or work behind a lawful primary picket line established at any Employer property by a union, which picket line has been sanctioned by the Joint Council of Teamsters No. 7, and also approved by the Bay Area Building Material Teamsters Committee, after fifteen (15) full working days of both withholding services and primary picketing at the Employer facility. . . .

(JA 439.)

[6] Section 20 of the parties' Agreement is entitled "Grievance Procedure" and provides, in relevant part: "All disputes arising under this agreement shall be resolved in accordance with the [Grievance] procedure," which includes arbitration as the third step. (JA 434-37.)

"International Union") guided Local 287's actions.[7] IBT agent Rome Aloise assumed a key leadership role with respect to the Local's negotiations and provided strategic information to the Local during bargaining including, but not limited to, a document comparing Teamsters bargaining agreements in the region. (JA 308-09.) Aloise also provided advice to Local 287 and instructed it to reject certain bargaining proposals. (*Id.*) He proposed bargaining meetings and stated he had authority to negotiate for the Local without the latter's approval. (*Id.*)

The first telephone call Netto made after the tentative agreement was reached was to Aloise. (JA-310.) Aloise, acting on behalf of the IBT, instructed Local 287 not to officially ratify the tentative agreement unless Granite Rock agreed to a hold-harmless side letter that would apply to all local and international unions that engaged in strike misconduct. (JA 311-12.)

On July 5, three days after the Agreement was ratified by Union members, Aloise and the Local called Granite Rock employees at their homes and instructed them not to return to work on July 6 to pressure Granite Rock into accepting the hold-harmless agreement. (*Id.*) On July 6, Local 287, at

---

[7] The District Court dismissed Respondent IBT under Federal Rule of Civil Procedure 12(b). The facts regarding the IBT, as recited below, are from the Third Amended Complaint. (JA 304-21.) All allegations in the Complaint must be presumed true and viewed in the light most favorable to Granite Rock. *See, e.g., Johnson v. Jones*, 515 U.S. 304, 313 (1995); *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1069 (9th Cir. 2006). Additional facts regarding Local 287 appear in the jury verdict and factual stipulations. (JA 374-80.)

the IBT's direction and inducement, threatened a Company-wide strike. (*Id.*) At the same time, Netto falsely claimed that the tentative agreement had not been ratified on July 2 and stated it would not be ratified unless Granite Rock agreed to hold all local and international unions harmless. (JA 312-13.) The agreement included an exception to permit internal union charges against union members. (JA 383-84.)

Granite Rock rejected the hold-harmless demand, expressing its understanding that the employees ratified the tentative agreement on July 2, which meant there was an Agreement between the parties that contained a binding no-strike clause. (JA-133.)

That day, on July 6, the IBT and Local 287 launched a new Company-wide strike, involving numerous facilities, hundreds of employees, and several other Teamsters locals. Aloise again assumed a key role in causing Local 287 to renew strike activity and in encouraging employees to engage in the new strike. He gave speeches to employees and union representatives and wrote letters rallying the various Teamsters Locals to support the strike. He not only maintained constant communication with Local 287, but dictated its actions. Aloise told Granite Rock he had IBT's authority to resolve unilaterally the dispute. Aloise's activities caused Local 287's breach of the Agreement's no-strike clause. Through Aloise's leadership, the IBT established itself as an entity with the authority and power to end the strike. The IBT also supplied strike benefits to keep Local 287 members on the picket lines and financially supported Local 287 with

a $1.2 million dollar loan, and thereby exerted actual control over the Local. (JA 308-15.)

Despite its predominant role, IBT did not sign Granite Rock and Local 287's Agreement. Nonetheless, IBT caused the strike that began on July 6 and continued until September 13, and did so to obtain a hold-harmless agreement for its own benefit.[8] (JA 317.) The strike occurred during Granite Rock's busiest season, inflicting substantial injury on the Company, its employees, and their families in an amount likely exceeding the net worth of the undercapitalized Local Union. (JA 317.)

III. PROCEDURAL HISTORY

A. District Court Proceedings.

When the IBT/Local 287 strike activity recommenced on July 6, Granite Rock immediately filed a complaint in federal court against Local 287, seeking a "*Boys Market* Injunction" to enjoin the strike.[9] Local 287 opposed the injunction by denying that a collective bargaining agreement existed. Netto falsely testified that the ratification had not

---

[8] The strike continued beyond August 22, the date the employees re-ratified the Agreement. (JA 313.)

[9] Under *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), federal courts may enjoin a strike if the dispute over which the strike occurs is arbitrable under a collective bargaining agreement. Granite Rock contended that the arbitrable issue in this case was Local 287's and IBT's demand to hold its members harmless for conduct during the strike (apart from the effort to secure immunity for IBT and other unions). *See, e.g., Complete Auto Transit, Inc. v. Reis*, 614 F.2d 1110, 1111-12 (6th Cir. 1980); *Cedar Coal Co. v. United Mine Workers of Am.*, 560 F.2d 1153 (4th Cir. 1977).

taken place on July 2. (JA 165-68.) Granite Rock, in the absence of an eye witness to the employee meeting, could not give direct testimony that ratification had occurred. As a result, the District Court denied the injunction request and allowed the strike to continue. (JA 203-11.)

The strike ended in mid-September without Granite Rock agreeing to hold the IBT harmless. Near the strike's end, Granite Rock revived its lawsuit after one bargaining unit member who attended the July 2 ratification vote came forward with a sworn statement that ratification absolutely occurred on July 2 contrary to the Union's repeated denials. (JA 378-80.) This employee came forward after he learned that Netto had falsely claimed under oath that no ratification had taken place. (*Id.*) Granite Rock continued the lawsuit, but no longer sought an injunction because IBT and Local 287 finally abandoned the strike and injunctive relief was no longer appropriate.

Based on discovery, the Company added factual details and claims against IBT for causing the strike. (JA 249-58.) IBT claimed that because it did not sign the collective bargaining agreement with Granite Rock (i.e., it was a "non-signatory"), it was immune from state and federal liability for its actions. (JA 328.) The District Court dismissed the IBT, interpreting Section 301(a) as granting jurisdiction only for claims against labor contract signatories. (JA 322-23.) The court severed the IBT claim for immediate appeal under Federal Rule of Civil Procedure 54(b). (JA 334-40.)

Although Local 287 continued to claim no contract existed, it moved for contractual arbitration

as to the claims brought against it as well as to whether a binding collective bargaining agreement existed. (JA 226-33, 343-62.) Based on *AT&T Technologies, Inc. v. Commc'n Workers of Am.*, 475 U.S. 643 (1986), the District Court ruled arbitration was improper without first determining whether the contract existed. (JA 226-33, 343-62.) The court held that "parties can only be required to submit to arbitration if they agreed to so submit," noting:

> [Local 287's] argument that the dispute is subject to the grievance and arbitration provisions of the contract, rather than court adjudication, is misplaced at this time. The provisions of the contract would only be binding if there was a contract in the first place; yet, Defendant claims the contract was never ratified. . . . Defendant cannot avail itself of arbitration while at the same time insisting that the agreement was never ratified. . . . [A] material issue of fact remains over the existence of the contract.

(JA 231.) (emphasis added).

The District Court ordered a jury trial to determine whether the Agreement came into being upon ratification on July 2. (JA 246-48.) After six days of trial, the jury unanimously found: (1) a vote by bargaining unit employees occurred on July 2; and (2) the employees voted to accept the tentative agreement. (JA 378-80.) At the time the new strike was commenced by IBT and the Local to obtain a hold-harmless agreement, a no-strike agreement therefore existed.

The next step in the lawsuit was to determine whether the strike violated the no-strike clause and, if so, to calculate the damages. Granite Rock sought to have these issues decided by a jury, but the District Court ruled they were arbitrable. (JA 234-48.)

B. The Ninth Circuit Decision.

Local 287 appealed the unanimous jury verdict to the Ninth Circuit. It raised four issues on appeal, including the issue of whether the court properly refused to compel arbitration of the formation issue. Granite Rock appealed the district court's decision to dismiss IBT from the suit, and its order compelling arbitration of Local 287's breach. The Ninth Circuit consolidated the appeals.

On October 22, 2008, the Ninth Circuit reversed the District Court ruling that it had jurisdiction to determine whether the Agreement existed as a prerequisite to arbitration. *Granite Rock Co. v. Int'l Bhd. of Teamsters, Local 287*, 546 F.3d 1169 (9th Cir. 2008).[10] The Ninth Circuit held that federal courts only have jurisdiction to determine whether a contract exists if 'there is a

---

[10] In a separate proceeding, the National Labor Relations Board ruled that Local 287 committed an unfair labor practice by refusing to give effect to the parties' Agreement in order to force Granite Rock to agree to a non-mandatory subject of bargaining, i.e, the hold-harmless agreement covering the IBT and Teamsters locals. *Teamsters Local 287, Int'l Bhd of Teamsters and Granite Rock Co.*, 347 NLRB No. 32 (2006). The Ninth Circuit separately affirmed the NLRB order, finding Local 287 committed unfair labor practices (Ninth Circuit case numbers 06-72964 and 06-73444). The IBT was not a party to either action.

challenge to the arbitration provision which is separate and distinct from any challenge to the underlying contract." *Id.* at 1176-77 (quoting *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404, 1410 (9th Cir. 1989)). The court relied on *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) for this holding, although this case did not involve a claim of fraud or any other defense alleging an existing contract was void or voidable. *See Granite Rock*, 546 F.3d at 1178.

The Ninth Circuit also affirmed dismissal of Granite Rock's Section 301(a) claim against IBT. The court acknowledged Section 301 "can be read as a 'congressional mandate to the federal courts to fashion a body of common law to be used to address disputes arising out of labor contracts,'" but declined to do so. *Id.*

Granite Rock's request for *en banc* review was denied on December 30, 2008. Granite Rock petitioned this Court for review of the Ninth Circuit's decision.

IV. SUMMARY OF ARGUMENT

A. Federal Courts Have Authority To Decide Disputes Over Initial Contract Formation Issues.

Arbitration is a matter of contract. Therefore, this Court has held that, absent clear and unmistakable contract language otherwise, federal courts, not arbitrators, have authority to decide whether a binding labor contract was formed. *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960); *Int'l Union of*

Operating Engineers, Local 150, AFL-CIO v. Flair Builders, Inc., 406 U.S. 487, 491-92 (1972); *AT&T Technologies, Inc. v. Commc'n Workers of Am.*, 475 U.S. 643, 649 (1986). The decision below disregards this fundamental legal principle.

In this case, Local 287 as well as IBT directed Granite Rock's employees to strike in violation of the Agreement's no-strike provision. Granite Rock sought to enforce the Agreement. In response, Local 287 denied that the Agreement had been formed, but, at the same time, moved to compel arbitration of the formation dispute pursuant to an arbitration provision in the same Agreement. The District Court denied Local 287's motion to compel, and submitted the contract formation dispute to a jury, which unanimously held that the Agreement had been formed.

The Ninth Circuit, citing this Court's decisions in *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440 (2006) and *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), reversed the district court's ruling, holding that because Granite Rock did not separately challenge the Agreement's arbitration provision, an arbitrator had authority to determine whether the Agreement exists. (JA 60.) Neither *Buckeye* nor *Prima Paint* stand for this proposition. These cases hold that, absent a separate challenge to an arbitration provision, an arbitrator should decide defenses, such as fraud in the factum, that would render an established contract void or voidable. *Prima Paint*, 388 U.S. at 403-04; *Buckeye*, 546 U.S. at 444-45. This Court, moreover, expressly stated that *Buckeye*

does not address initial contract formation issues. *Id.* at 444 n.1.

The Ninth Circuit found that Granite Rock consented to arbitration by filing suit to enforce its contract with Local 287, despite language in the Agreement's arbitration provision limiting an arbitrator's authority to decide disputes "aris[ing] under" the contract. (JA 434.) Nothing in the Agreement suggests that the parties agreed to arbitrate disputes over whether the Agreement existed.

The Ninth Circuit's decision raises multiple public policy concerns. First, for a half century, this Court's labor arbitration jurisprudence provides judicial determination over issues of contract formation. Without the guarantee of such impartial judicial determinations, the use of arbitration will decline and negotiating parties will either avoid arbitration language, significantly narrow the scope of arbitration provisions, or avoid tentative agreements. Finally, if the decision below stands, unions receive an unfair advantage since they may compel arbitration on tentative agreements while simultaneously disregarding a no-strike promise that serves as consideration for arbitration.

B. A Section 301(a) Action And Remedy Should Be Recognized To Address Parent Unions' Inducement Of Strikes Violating Bargained-For No-Strike Provisions In Labor Contracts.

The decision below disregards Section 301(a)'s intent to ensure uniform labor contract enforcement and to promote industrial peace through judicial

enforcement of no-strike and no-lockout provisions. In this case, an international union, IBT, directly induced a violation of Granite Rock and Local 287's labor contract by displacing its local affiliate and instructing employees to strike in its effort to procure an immunity agreement from Granite Rock for its own benefit. The Ninth Circuit erroneously rejected Granite Rock's action against IBT, holding that Section 301(a) does not provide jurisdiction over claims against non-signatories that do not have rights or obligations arising under a labor contract. (JA 49-50.) A cause of action for IBT's causing and inducing a labor contract violation fits squarely within Section 301(a)'s framework and statutory purpose to promote labor peace. *Textile Workers Union of Am. v. Lincoln Mills*, 353 U.S. 448, 551 (1957).

The plain language of Section 301(a) also supports an action against IBT. The statute provides jurisdiction over "suits" for "violation" of a contract "between a labor organization and an employer engaged in interstate commerce." 29 U.S.C. § 185(a). This Court has interpreted Section 301(a) broadly to provide jurisdiction over claims that require interpretation and application of labor contracts. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985). Once a plaintiff passes through this jurisdictional gateway, this Court has instructed courts to "fashion a body of federal law for enforcement of . . . collective bargaining agreements." *Lincoln Mills*, 353 U.S. at 551; *Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Auto Aerospace & Agric. Implement Workers of Am.*, 523 U.S. 653, 658-59 (1998).

Consistent with Section 301(a)'s plain language, Petitioner alleges a "sui[t] for violation" of a contract "between" a labor organization, Local 287, and an employer, Granite Rock, and seeks the same contractual damages from IBT that it could recover from a signatory party. 29 U.S.C. § 185(a). Whether IBT caused a contract violation requires interpretation and application of the language of the contract's multi-paragraph no-strike provision. IBT caused and induced a violation of the contract by directing Local 287 to ignore the contract and directly instructing Petitioner's employees to strike to procure a hold-harmless agreement. But for the actions of IBT, a violation of the contract's no-strike provision would not have occurred.

Public policy also supports Petitioner's claim. For two centuries, this Court has been guided by the maxim "for every wrong, there is a remedy." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). Section 301(a) preempts Granite Rock's state law claim against IBT. *Allis-Chalmers*, 471 U.S. 202, 209 (1985). By refusing to exercise Section 301(a) jurisdiction over Granite Rock's action against IBT for causing and inducing a violation of Granite Rock and Local 287's labor contract, and at the same time, preempting state law actions against IBT, the Ninth Circuit permits IBT to cloak itself with immunity. This decision thus creates a blueprint for industrial chaos - not industrial peace.

V. THE FEDERAL COURT, NOT THE ARBITRATOR, HAS THE AUTHORITY TO DETERMINE WHETHER A BINDING CONTRACT CONTAINING AN ARBITRATION PROVISION WAS INITIALLY FORMED.

Two distinct lines of Supreme Court cases have evolved with respect to arbitration. The first line of cases addresses arbitrabilty questions, and holds that federal courts must decide the issue before compelling arbitration. *See John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-47 (1964) (whether party is bound by an agreement containing an arbitration clause is a "threshold question for the court"); *AT&T Technologies Inc. v. Commc'n. Workers of Am.*, 475 U.S. 643, 649 (1986) ("Unless the parties clearly and unmistakably provide otherwise, the question whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995) (ambiguous issue in contract must not be deferred to arbitration when it concerns arbitrability); *Howsam v. Dean Witter Reynolds*, Inc., 537 U.S. 79, 85-86 (2002) (distinguishing procedural defenses, such as a statute of limitations, which are arbitrable, from contract formation issues, which may not be deferred to an arbitrator unless parties clearly and unmistakably agree). These cases uniformly emphasize that arbitration is a matter of contract, and hold that questions about the existence and scope of an arbitration agreement must be decided initially by the courts.

The second line of Supreme Court jurisprudence holds that an arbitrator should decide defenses, such as fraud in the factum or fraud in the inducement, that would render an established contract void or voidable. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006). These cases hold that, because an arbitration provision is severable from the remainder of the contract, the arbitrator determines the contract's validity (as opposed to its formation), unless one party separately claims the arbitration provision is invalid. *Prima Paint*, 388 U.S. at 402-04; *Buckeye*, 546 U.S. at 449. In *Buckeye*, a case addressing a signed contract one party claimed was void due to illegality, this Court expressly declined to address whether contract formation is a judicial or arbitral determination. *Buckeye*, 546 U.S. at 444 n. 1.

In this case, Granite Rock has contended from the outset that once ratification occurred on July 2, the parties had a valid, binding collective bargaining agreement that the Union was obligated to respect. (JA 62-79.) The Union claimed, however, that no collective bargaining agreement existed because there had been no ratification of the tentative agreement. (JA 133, 312-13.) The issue was clear: was a contract formed by ratification on July 2. The District Court, relying on *AT&T Technologies*, correctly determined that the formation issue had to be resolved by the federal court. (JA. 229-31.) After six days, the jury unanimously agreed that on July 2, a collective bargaining agreement was formed when bargaining unit members ratified the tentative agreement. (JA 378-80.) The Union

continues to contest the verdict, claiming, *inter alia*, that an arbitrator should have decided whether the collective bargaining agreement had been formed. The Union's position is wrong and, if adopted by this Court, would deter, not encourage, agreements to arbitrate.

A. It Is Axiomatic That There Can Be No Duty To Arbitrate Absent A Contract Between The Parties.

Time and again, this Court has made clear "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960). This foundational legal principle recognizes and reflects the truism that "[a]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *AT&T Technologies*, 475 U.S. at 648-49 (1984) (citing *Gateway Coal Co. v. Mine Workers of Am.*, 414 U.S. 368, 374 (1974). Absent clear and unmistakable evidence to the contrary, the court, not the arbitrator, has the authority to determine whether a contract was formed. *John Wiley & Sons, Inc.*, 376 U.S. at 546-47 (1972).

In *Int'l Union of Operating Engineers, Local 150, AFL-CIO v. Flair Builders Inc.*, 406 U.S. 487 (1972), the employer asserted that the labor contract, containing the pertinent grievance and arbitration provision, was never formed, and that, if consummated, the agreement was subsequently abandoned by the union. *Id.* at 488. The district court concluded that the employer and the union

entered into a binding labor contract. *Id.* at 489. This Court held that the district court properly resolved the parties' dispute over the existence of the contract, stating:

> [N]othing we say here diminishes the responsibility of a court to determine whether a union and employer have agreed to arbitration. That issue, as well as the scope of the arbitration clause, remains a matter for judicial decision.

Id. at 491-92 (citing *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962)).

In *AT&T Technologies*, 475 U.S. at 649, this Court clarified further the federal courts' jurisdiction to determine questions of arbitrability. The issue in *AT&T Technologies* was whether the district court or the arbitrator should determine if the parties' dispute over layoffs was subject to the grievance and arbitration provision. Both parties agreed a collective bargaining agreement existed. Nonetheless, the Court stated:

> the question of arbitrability – whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance – is undeniably an issue for judicial determination.

Id. at 649 (emphasis added). Applying that principle, the Court went on to hold that the court, not the arbitrator, must decide whether the layoff

dispute was subject to the agreement's grievance and arbitration provision. *Id.* at 652.

This Court continues to apply its holding in *AT&T Technologies* to decide issues of arbitrability under labor and commercial contracts. In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995), the Court considered who had authority to determine if the parties to a commercial contract consented to arbitrate their dispute over the payment of certain debts. The Court soundly rejected the argument that the court does not have that authority. In doing so, it cautioned, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id.* at 944 (quoting *AT&T Technologies*, 475 U.S. at 649).

Similarly, in *Litton Fin. Printing Div. v. N.L.R.B.*, 501 U.S. 190, 208-09 (1991), the Court considered whether the court or an arbitrator has authority to determine if a party to a collective bargaining agreement must arbitrate a grievance after the agreement expired. Once again, the Court re-affirmed the principle that "arbitration is a matter of consent, and that it will not be imposed upon parties beyond the scope of their agreement." *Id.* at 201. It further stated "[w]hether or not a company is bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the court, and the party cannot be forced to 'arbitrate the arbitrability question.'" *Id.* at 208 (quoting *AT&T Technologies*, 475 U.S. at 651). The Court thus held that, absent clear contractual language indicating otherwise, the court – not the arbitrator – has authority to resolve disputes over

the arbitrability of grievances filed after the agreement has expired. *Id.*

In *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452 (2003), the Court considered who had authority to decide if the parties' arbitration clause permitted class arbitrations. The Court concluded that the arbitrator had that authority, but noted that, "[i]n certain limited circumstances, courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matters . . . ." *Id.* It stated:

> These limited circumstances typically involve matters of a kind that 'contracting parties would likely have expected a court' to decide. [citation omitted] They include certain gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concedingly binding arbitration clause applies to a certain type of controversy.

Id. (emphasis added) (citing *Howsam*, 537 U.S. 79, 83 (2002)).

The courts of appeal have obediently followed this clear and fundamental principle, and repeatedly have found that issues regarding whether a collective bargaining agreement or commercial contract was initially formed are for the court. For example, in *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 105 (3d Cir. 2000), the Third Circuit held that when a defendant claimed the contract was not binding because the individual who had signed it on behalf of the defendant lacked sufficient authority,

the defendant could not properly move to compel arbitration of the formation issue on the basis of the contract's arbitration clause.

The court agreed with the plaintiff that when a party claims the contract was never formed, the court, not the arbitrator, must determine whether the contract was binding. *Id.* The Third Circuit dismissed the defendant's argument that, in order for the district court to consider the contract formation dispute, plaintiff must separately challenge the validity of the arbitration agreement. *Id.* at 105. It stated:

> [T]he question whether the underlying contract contains a valid arbitration clause still precedes all others because 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'

Id. at 105 (quoting *AT&T Technologies*, 475 U.S. at 648). The Third Circuit reasoned that the defendant cannot simultaneously seek to arbitrate the dispute and claim the contract containing the arbitration clause was never binding. *Id.* at 108. It concluded that to rule otherwise "allow[s] the arbitrator to determine their own jurisdiction, something that is not permitted in the federal jurisprudence [of arbitration], for the question whether a dispute is to be arbitrated belongs to the courts unless the parties agree otherwise." *Id.* at 111.

Similarly, in a case involving whether conditions precedent to the creation of a labor contract had occurred, the Second Circuit correctly

reasoned that "[i]f the contract embodying a purported arbitration agreement never existed, the arbitration agreement itself does not exist." *Adams v. Suozzi*, 433 F.3d 220, 226 (2d Cir. 2005) (citations omitted). It also stated "[t]he District Court possessed not only authority, but a duty, to determine whether there ever existed an agreement to arbitrate between the parties." *Id.* (citing *AT&T Technologies*, 475 U.S. at 649). Since nothing in the agreement suggested that the parties intended to permit the arbitrator to determine arbitrability, the Second Circuit affirmed the district court's decision. *Id.*

In sum, courts overwhelmingly conclude that courts, not arbitrators, must resolve initial contract formation disputes and disputes over arbitrability absent clear and unmistakable evidence that both parties relinquished their right to have the issue decided by a federal judge. Quite simply, if no valid, binding contract exists or, alternatively, the parties never agreed to arbitrate the dispute in question, no basis exists in contract or otherwise to permit the arbitrator to resolve the dispute. Absent clear and unmistakable evidence to the contrary, an arbitrator cannot determine his or her own jurisdiction *AT&T Technologies*, 475 U.S. at 649; *Sandvik AB*, 220 F.3d at 111.

In this case, Local 287 disputed that the Agreement was formed but sought arbitration under that very Agreement. In the face of a contrary jury verdict, Local 287 continues to claim that the Company's employees never ratified the Agreement. (JA 46-47.) The District Court properly held that, pursuant to this Court's holding in *AT&T*

Technologies, 475 U.S. at 649, the court, not the arbitrator must decide the issue of formation. (JA 229-31.) The Ninth Circuit's contrary ruling is erroneous, against this Court's clear precedent, and inconsistent with other circuit court decisions.

B. Granite Rock Did Not "Clearly And Unmistakably" Agree To Arbitrate The Issue Of Contract Formation.

The Agreement between Granite Rock and Local 287 makes clear that only issues "aris[ing] under" it, not issues of formation, will be arbitrated. *A fortiori*, the Agreement does not contain clear and unmistakable language evidencing that the parties intended an arbitrator to decide contract formation.

The Agreement states in relevant part:

> *Section 20 – Grievance Procedure*
>
> All disputes arising under this agreement shall be resolved in accordance with the following procedure:
>
> . . .
>
> f. Decisions of the impartial Arbitrator shall be within the scope and terms of this agreement and shall be final and binding upon all the parties provided such decision is specifically limited to the matter submitted and does not amend any provisions of this agreement.

(JA 434-35.)

Use of the phrases "arising under this agreement," and "within the scope and terms of this agreement," presuppose that a valid, binding collective bargaining agreement has been formed. (*Id.*) A dispute cannot "aris[e] under" nor can decisions made by the arbitrator fall "within the scope and terms" of the collective bargaining agreement if it was never formed. (*Id.*) (emphasis added).

Because the language of the collective bargaining agreement's grievance and arbitration provision pertains to disputes concerning the interpretation and application of the Agreement itself, as opposed to the question of whether it was formed, the Agreement does not permit the arbitration of arbitrability. Accordingly, Granite Rock and the Union did not "clearly and unmistakably" consent to arbitrate whether a contract was created. *AT&T Technologies*, 475 U.S. at 649.

The Ninth Circuit held that Petitioner "implicitly" consented to arbitration by suing to enforce its contract. (JA 60.) Now, in the Ninth Circuit, a party that seeks to enforce a contract with an arbitration provision will be deprived of judicial review of formation. This Court has held the opposite, stating it should be assumed that the parties intended the court, not the arbitrator, to decide this "gateway" issue. *Green Tree*, 539 U.S. at 452.

C. This Court's Decisions In *Buckeye Check Cashing* and *Prima Paint Corp.* Do Not Address Courts' Authority To Resolve Whether A Contract Was Created.

In *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), and *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), this Court held that, because an arbitration agreement is severable, the arbitrator determines challenges to an admitted contract's validity unless one party separately claims the arbitration clause is invalid. Neither case, however, addressed the courts' jurisdiction to resolve initial contract formation disputes.

In *Buckeye*, this Court expressly distinguished the very issue raised in this case, as follows:

> The issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded. Our opinion today addresses only the former, and does not speak to the issue decided in the cases cited by respondents (and by the Florida Supreme Court), which hold that it is for courts to decide whether the alleged obligor ever signed the contract . . ., whether the signor lacked authority to commit the alleged principle, . . . and whether the signor lacked the mental capacity to assent ....

546 U.S. at 444 n.1 (internal citations omitted) (emphasis added). As such, *Buckeye* has no applicability to this case because the parties' dispute concerns whether a contract was ever created, not whether an acknowledged, existing contract was void or voidable.

In *Prima Paint*, both parties agreed there was a contract for the plaintiff to purchase the defendant's business. 388 U.S. at 397-98. Plaintiff claimed later that the defendant had fraudulently represented its ability to perform its contractual obligations, refused to pay and sought to rescind the contract, claiming it was voidable. *Id.* at 398-99. The defendant moved for a stay pending arbitration, which the district court granted. *Id.* This Court maintained the stay because both parties acknowledged there was an agreement between them and the arbitration clause included arbitration of controversies "relat[ed] to" the contract that both parties agreed had been formed. *Id.* at 406. Thus, the Court acknowledged that a fundamental difference exists between disputes over contractual defenses and disputes over whether a valid, binding contract was ever formed. *Id.*

The questions before this Court in *Prima Paint,* and *Buckeye* concerned the authority to resolve disputes over certain defenses raised to avoid enforcement of contracts that both parties agreed were formed. In both, the parties operated under the respective contracts for a substantial time, but later raised defenses that, if proven successful, would render all, or part, of the contracts void. This Court found that such disputes "relate to" an existing contract, and thus, logic dictates that the

arbitrator, not the court, has jurisdiction to resolve them. Furthermore, in *Buckeye*, 546 U.S. at 444 n. 1, this Court expressly declined to consider the precise issue posed here, i.e., whether courts or arbitrators should decide disputes over whether a valid, binding contract was formed. In doing so, the Court acknowledged that a fundamental difference exists between disputes over contractual defenses and disputes over whether a valid, binding contract was ever formed. *Id.*

Critically, the Court's decisions in *Prima Paint* and *Buckeye* do not abrogate the applicability of *AT&T Technologies* to this case. This Court has repeatedly stated, with respect to the arbitrability of disputes, especially disputes concerning certain gateway issues such as whether the parties formed a binding contract, courts must resolve arbitrability unless "clear and unmistakable" evidence exists indicating that the parties intended to provide that authority to an arbitrator. *AT&T Technologies*, 475 U.S. at 649; *First Options of Chicago*, 514 U.S. at 943; *Howsam*, 537 U.S. at 83; *Litton Fin. Printing Div*, 501 U.S. at 208-09; *Green Tree*, 539 U.S. at 452. No such evidence exists here.

D. The Decision Below, If Left Undisturbed, Will Discourage Parties From Negotiating And Agreeing To Arbitration Language.

If allowed to stand, the Ninth Circuit's decision will adversely affect labor relations. The holding also has potential implications beyond the labor context, affecting virtually all commercial contracts in which parties intend to arbitrate disputes arising under their contract.

Focusing on labor relations, three disruptions to industrial peace flow from the Ninth Circuit decision. First, no concept is more important to labor peace than arbitration. This Court expressly recognizes that arbitration "furthers the national labor policy of peaceful resolution of labor disputes." *AT&T Technologies*, 475 U.S. at 651. "The willingness of parties to enter into agreements that provide for arbitration of specified disputes would be 'drastically reduced,' however, if a labor arbitrator had the 'power to determine his own jurisdiction...'" *Id.* (quoting *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 371-72 (1984) and Archibald Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1509 (1959)). The Ninth Circuit's holding does just that - it gives an arbitrator the power to determine his or her own jurisdiction which, in turn, could be manipulated to serve his or her own best interests. This concern is accentuated by the fact that arbitration awards are far less reviewable than court decisions. *See Major League Baseball Ass'n v. Garvey*, 532 U.S. 504, 509-10 (2001). Indeed, this Court has stated that federal courts may only vacate labor arbitration awards upon a showing that the award "strays from interpretation and application of the agreement and [the arbitrator] effectively 'dispense[d] his own brand of industrial justice.'" *Id.* at 509 (quoting *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)). An arbitrator's "improvident, even silly fact-finding," will not justify vacating the award. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 39 (1987).

Second, allowing one party to enforce an arbitration clause without giving effect to the remainder of the agreement, i.e., the no-strike provision, impairs labor peace. No-strike agreements are vital to the nation's economic well-being. "The grievance and arbitration procedure is conventionally regarded as the union's compensation for surrendering the right to strike during the period while the agreement is in force – "the 'quid pro quo' for an agreement not to strike." *Int'l Ass'n of Machinists & Aerospace Workers, Progressive Lodge No. 1000 v. Gen. Elec. Co.*, 865 F.2d 902, 903 (7th Cir. 1989) (quoting *Warrior & Gulf*, 363 U.S. at 578 n. 4). To allow unions to avail themselves of arbitration provisions without giving contemporaneous effect to the no-strike provision poses a real and serious threat to interstate commerce, and to the very nature of the collective bargaining agreement that has existed for over 50 years. *Lincoln Mills*, 353 U.S. at 455 (1957); *Warrior & Gulf Nav. Co.*, 363 U.S. at 583-84.

Third, "tentative agreements" are commonplace in labor negotiations, and greatly decrease the time necessary to complete contracts. They give parties a measure of progress that discourages regressive bargaining and propels negotiations forward. Before the decision below, employers and unions knew they could tentatively agree to provisions, including an arbitration provision, without being bound before negotiations concluded. Allowing unions or employers to dispute that a binding contract exists while simultaneously availing themselves of arbitration discourages tentative agreements containing such a provision. The Ninth Circuit's holding that a "tentative

agreement" on arbitration language can provide an interested arbitrator jurisdiction to determine that a valid, binding agreement exists and what its terms are jeopardizes the use of tentative agreements in labor relations.

Through its holding, the Ninth Circuit has deprived parties that negotiate labor and commercial contracts from the opportunity to present disputes over a contract's existence to an impartial judiciary. Article III of the Constitution confers judicial powers on impartial judges subject to higher court review. The Ninth Circuit holding takes away this threshold judicial determination and places it in the hands of an arbitrator. Indeed, the decision below places arbitrators in the untenable position of resolving a dispute where, if the decision is that the contract was not formed, the arbitrator effectively determines that he or she lacked any authority to make that determination. *Sandvik AB*, 220 F.3d at 111 ("were the arbitrators ultimately to decide" that no contract was formed, the arbitrators "will have effectively decided that they have no authority to decide the dispute"). Such a result should not be allowed to stand.

VI. A NON-SIGNATORY INTERNATIONAL UNION THAT DISPLACES ITS AFFILIATED LOCAL AND CAUSES A STRIKE VIOLATING A COLLECTIVE BARGAINING AGREEMENT CANNOT CLOAK ITSELF WITH IMMUNITY FROM SECTION 301(A) OF THE LABOR MANAGEMENT RELATIONS ACT.

During the 1940s, labor strikes posed a substantial threat to the national economy and occurred despite negotiated no-strike provisions in collective bargaining agreements. In the wake of economic uncertainty and patchwork enforcement of collective bargaining agreements, Congress enacted Section 301(a) to provide for uniform federal enforcement of labor contracts. At its core, the statute was intended to promote industrial peace through judicial enforcement of no-strike and no-lockout provisions. *Lincoln Mills*, 353 U.S. at 451; *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.*, 369 U.S. 95, 104-05 (1962).

In this case, IBT, a non-signatory to Granite Rock and Local 287's labor contract, caused a strike that breached the no-strike provision in that contract. IBT instigated and directly induced the strike to extort from Granite Rock an immunity agreement benefiting IBT. The strike inflicted substantial harm on Petitioner, its employees, and their families. The Court is asked to recognize a cause of action and provide a remedy under Section 301(a) for IBT's conduct that directly caused a breach of Local 287 and Granite Rock's labor contract for its own benefit.

The Third Amended Complaint details IBT's misconduct. (JA 306-19.) On July 5, 2004, Rome Aloise, acting on behalf of IBT, "called union members at their homes and instructed, authorized, instigated, and encouraged them not to return to work." (JA 311-12.) IBT then directed Local 287 not to honor its new labor contract with Granite Rock. (JA 313.) Assuming control, IBT ignited and sustained a two-month Company-wide strike in violation of the labor contract's no-strike clause. (*Id.*) During this dispute, IBT proclaimed it had authority to settle the unlawful strike. (JA 313-14.) The strike's purpose was not to obtain higher wages or better benefits for employees. It was an attempt to force Granite Rock to grant IBT and other unions full immunity for past misconduct. (JA 313.)

Granite Rock refused to acquiesce and sought relief for IBT's misconduct by filing the instant action for contractual damages[11] alleging that IBT, by and through its own direct actions, induced a breach of the contract with Local 287 by displacing Local 287 and directly causing a violation of the no-strike provision of the Agreement between Granite Rock and Local 287 for IBT's own gain. Petitioner respectfully requests that, pursuant to its authority under Section 301(a), this Court recognize a federal common law action and remedy for causing and inducing a breach of a labor contract, providing Granite Rock the ability to seek the same contractual remedies from IBT that would be

---

[11] The Third Amended Complaint requests "damages according to proof," and "[s]uch other and further relief as the Court may deem just and proper." (JA 320.) It does not request punitive or exemplary damages.

available when a signatory union violates a labor contract. Without this relief, the preemptive force of Section 301(a) cloaks IBT with the very immunity it tried to coerce from Granite Rock, and, at the same time, establishes a blueprint for the industrial chaos Congress sought to avoid. Granite Rock's action fulfills the important public policy of ensuring labor peace by holding IBT responsible for its own misconduct.

A. The Plain Language Of Section 301(a) Establishes Jurisdiction Over The IBT As This Case Involves A "Violation" Of A Contract "Between" A Labor Organization And An Employer.

When interpreting a statute, the Court begins with the plain language. *Jimenez v. Quarterman*, 555 U.S. ___ (January 13, 2009), 129 S.Ct. 681, 685, 172 L.Ed.2d 475 ("As with any question of statutory interpretation, our analysis begins with the plain language of the statute."). Section 301(a) of the Labor Management Relations Act provides courts jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce." 29 U.S.C. § 185(a).

"Section 301 is not to be given a narrow reading." *Smith v. Evening News Ass'n*, 371 U.S. 195, 199 (1962). In *Textron Lycoming Reciprocating Engine Div. v. United Auto. Aerospace & Agric. Implement Workers of Am.*, 523 U.S. 653, 657 (1998), this Court concluded that, by use of the word "for" within the phrase "[s]uits for violation of contracts," Congress intended that federal courts exercise jurisdiction over any "suits that claim a

contract has been violated." Moreover, because the word "between" modifies "contracts," not "suits," it does not limit Section 301(a) jurisdiction to claims alleged by or against a signatory to a labor contract. *Smith*, 371 U.S. at 200; *Woodell v. Int'l Bhd. of Elec. Workers, Local 71*, 502 U.S. 93, 100-01 (1991); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 556 (1976).

In sum, all that is required for subject matter jurisdiction under Section 301(a) is that the suit was: (1) "filed because a contract has been violated," and (2) the contract in question is "between" an employer and a labor organization. *Textron*, 523 U.S. at 657; *Smith*, 371 U.S. at 200. The plain language of Section 301(a) does not place restrictions on who may sue or be sued based on their signatory status nor does it limit courts' jurisdiction to only breach of contract claims.

Granite Rock alleged, and later proved, that a contract existed "between" a labor organization, Local 287, and an employer, Granite Rock, subject to federal courts' jurisdiction. (JA 378-82.) Granite Rock further alleged that this contract was "violated" by a labor organization, IBT, as well as Local 287 when, by their concerted actions, IBT and Local 287 induced and caused a strike prohibited by the contract's no-strike provision. (JA 304-21.) Petitioner's claim against IBT is, therefore, a "suit" for violation of a labor contract. 29 U.S.C. § 185(a). Section 301(a)'s plain language supports federal court jurisdiction over Granite Rock's claim against IBT. *See Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) ("when the statutory language is

plain," the Court "must enforce it according to its terms").

B. This Court's Decisions Interpreting Section 301(a) Are Consistent With And Support Recognizing A Cause Of Action Against IBT.

In its landmark decision, *Lincoln Mills*, this Court interpreted Section 301(a) to provide federal courts with jurisdiction over any claims that require interpretation and application of labor contracts. 353 U.S. at 451. The Court further instructed that the statute "authorizes courts to fashion a body of federal law for the enforcement of . . . collective bargaining agreements." *Id.* at 450-51; *Allis-Chalmers v. Lueck*, 471 U.S. 202, 209 (1985). The federal law created under Section 301 is fashioned "from the policy of our national labor laws." *Lincoln Mills*, 353 U.S. at 456-57. When a problem implicating a labor contract lacks express statutory sanction, this Court has instructed that it is to "be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be limited only by the nature of the problem." *Id.*

Pursuant to its authority under Section 301(a), this Court has fashioned and recognized various federal common law causes of action, and remedies for enforcement of labor contracts. *See Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570, 573-74 (1990) (employee claiming a "hybrid" duty of fair representation and breach of contract claim under Section 301 had right to trial by jury even though the claim presented both legal and equitable issues);

Int'l Bhd. of Elec. Workers AFL-CIO v. Hechler, 481 U.S. 851, 863-65 (1987) (court had jurisdiction over union member's state law tortious breach of contract claim for union's alleged failure to enforce safety rules and conduct training required by the collective bargaining agreement and remanding for determination of applicable statute of limitations); *DelCostello v. Int'l Bhd. of Teamsters, et al.*, 462 U.S. 151, 165 (1983) (under Section 301(a) an employee may allege that his or her union breached the duty of fair representation concurrent with a breach of contract claim against his or her employer, and that "[i]f a breach of duty by the union and breach of contract by the employer are proven, the court must fashion an appropriate remedy"); *Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Hoosier Cardinal Corp.*, 383 U.S. 696, 707-08 (1966) (adopting six-year statute of limitations for union's claim under Section 301(a) that the employer had violated labor contract). In *Textron*, 523 U.S. at 658-59, this Court again emphasized Section 301(a)'s applicability to suits alleging violations of contract, stating "[t]hat [Section 301(a)] simply erects a gateway through which parties may pass into federal court; once they have entered, it does not restrict the legal landscape they may traverse."

This case concerns a violation of a labor contract that requires interpretation of its multi-faceted no-strike provision to determine whether the alleged violation occurred. Granite Rock has established jurisdiction and, thus, the "gateway" has opened through which courts have authority to fashion federal common law to carry out Section 301(a)'s purposes. *Textron*, 523 U.S. at 658.

Holding IBT responsible for displacing Local 287 in its role of enforcing the labor contract, and then causing a strike in violation of Local 287 and Granite Rock's Agreement directly furthers Section 301(a)'s purpose of maintaining labor peace during the term of a labor contract.[12]

C. The Legislative History Of The LMRA And Section 301(a) Support A Federal Cause Of Action Against IBT.

1. Congress Enacted The LMRA To Promote Labor Stability And Prevent The Use Of Economic Force To Resolve Issues Under An Existing Collective Bargaining Agreement.

The "General Provisions" of the LMRA, as enacted, set forth Congress' declaration of the

---

[12] Petitioner's proposed Section 301(a) action is supported by the allegations in its Complaint and includes proving: (1) IBT had knowledge of Granite Rock and Local 287's Agreement, including the non-strike provision; (2) IBT intentionally instructed members to strike in violation of the contract; (3) IBT induced Local 287 to breach the labor contract; (4) IBT, through its actions, displaced Local 287 triggering the strike that breached the contract (including assumed authority to resolve the strike ending the contract violation); (5) IBT violated the contract; (6) the interpretation and application of the contract is necessary to establish the violation; and (7) damages resulted from the contract violation. *See, e.g., Milne Employees Ass'n*, 960 F.2d at 1411 (setting forth the elements of contractual interference/inducement claims). Petitioner's claim includes some of these elements as well as many more traditional contract violation elements). If necessary, Petitioner can prove also that IBT violated the contract to procure a benefit for itself, and that but for the actions of IBT the strike would not have taken place.

LMRA's purpose and policy to end labor disputes that interfere with commerce:

> Industrial strife which interferes with the normal commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights . . .
>
> It is the purpose and policy of this chapter, in order to promote the full flow of commerce . . . to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

29 U.S.C. § 141(b).

When debating the legislation, Congress pointed to staggering increases in strikes and lost hours of work by unionized employees as justification for the legislation. For example, the House reported that the average number of strikes in the United States rose from 753 per year to 3,514 in 1944, and affected an average of 1.5 million employees per year.[13] Congress also noted an

---

[13] H.R. REP. NO. 80-245, at 3-4 (1947) *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 292, 294-95 (1948). All legislative history cited

exponential increase in strikes from 1945 to 1946, during which the approximate days of labor lost in the United States tripled from 38 million to 116 million, and loss of wages for workers involved in strikes reached well over $1 billion.[14]

As the House reported on its initial bill, "[d]uring the last few years, the effects of industrial strife have, at times, brought our country to the brink of economic paralysis."[15] The Senate drew particular attention to the problem of labor disputes, like the strike waged against Granite Rock, that occurred during the term of a labor contract, stating:

> If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. . . . Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is

---

herein is available at http://www.heinonline.org.

[14] H.R. Rep. No. 80-245, at 4 (1947) *reprinted in* 1 NLRB, Legislative History of the Labor-Management Relations Act, 1947, at 292, 295 (1948); S. Rep. No. 80-105, at 2 (1947) *reprinted in* 1 NLRB, Legislative History of the Labor-Management Relations Act, 1947, at 407, 408 (1948). The dollar figures discussed here do not account for inflation.

[15] H.R. REP. NO. 80-245, at 3 (1947) *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 292, 294 (1948).

> little reason an employer would desire to sign such a contract.[16]

The provision analogous to Section 301(a) of the original LMRA, as reported and passed by the House, *Id.* stated, in relevant part:

> Equal Responsibility and Liability
>
> Sec. 302. (a) Any action for or proceeding involving a violation of an agreement between an employer and a labor organization or other representative of employees may be brought by either party in any district court of the United States without jurisdiction of the parties, without regard to the amount in controversy, if such agreement affects commerce, or the court otherwise has jurisdiction of the cause.[17]

The House bill limited actions to signatories. *Id.* The Senate, however, discarded portions of the House bill and passed a version that had no such

---

[16] S. Rep. No. 80-105, at 16 (1947) *reprinted in* 1 NLRB, Legislative History of the Labor-Management Relations Act, 1947, at 407, 422 (1948) (emphasis added).

[17] H.R. 3020, 80th Cong., at 64 (1947) (as reported by H.R. Comm. On Education And Labor) *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 31, 94 (1948); H.R. 3020, 80th Cong., at 64 (1947) (as passed by the House of Representatives). *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 158, 221 (1948).

limitation. The bill, as reported and passed by the Senate (S. 1126) contained, in relevant part, the following provision:

> Suits By And Against Labor Organizations
>
> Sec. 301. (a) Suits for violation of contracts concluded as the result of collective bargaining between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.[18]

The aforementioned language suggests a conscious decision by the Senate to allow suits by and against non-signatories to labor contracts. The bill, as reported by the conference committee, reconciling H.R. 3020 and S. 1126, which was ultimately enacted into law, largely mirrors the original Senate bill.[19] Simply put, the legislative

---

[18] S. 1126, 80th Cong., at 53 (1947) (as reported by the S. Comm. On Labor and Public Welfare). *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 99, 151 (1948); H.R. 3020, 80th Cong., at 121 (1947) (as passed by the Senate). *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 226, 279 (1948).

[19] H.R. REP. NO. 80-510, at 23 (1947) *reprinted in* 1 NLRB,

history of Section 301(a) supports Petitioner's assertion that Congress intended suits under Section 301(a) to extend beyond signatories to labor contracts.

When debating the amendment to the LMRA permitting "suits for violations of contract," the Senate further observed that, if the bill excluded the amendment, "[t]here are no Federal laws giving either an employer or even the Government itself any right of action against a union for any breach of contract. Thus there is no 'substantive right' to enforce, in order to make the union suable as such in Federal courts."[20] Section 301 was designed to fill this gap. The Senate concluded that, "[s]tatutory recognition of the collective bargaining agreement as a valid, binding and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace."[21]

LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 505, 527 (1948).

[20] S. REP. NO. 80-105, at 17 (1947) *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 407, 423 (1948).

[21] *Id.* Even the House minority members opposing parts of the bill recognized the need for legislation, noting that the difficulty in suing unions stemmed from the challenge of reaching union assets due to their unincorporated association status. It stated:

> No one can deny that labor unions have engaged in some activities that are so clearly unjustifiable that this Congress can and should legislate against them immediately.

Congress' expressed intent to promote industrial peace supports recognition of the cause of action alleged in this case. Any value and stability that Granite Rock achieved through its Agreement with Local 287 was destroyed by IBT's inducement of the breach. Rarely does the legislative history of a mature, long-standing statute so closely parallel its necessary twenty-first century application.

2. The Enactment of Section 301(a) Federalized What California Law Already Permitted: Lawsuits Against Labor Organizations For Tortious Inducement/Interference With Contracts As A Cause Of Action.

When debating the LMRA, the Senate observed that, prior to 1947, some states, including California, provided state law causes of action to hold unions liable for interfering with labor contracts.[22] In fact, California recognized

---

> These were covered by the President [Truman] in his State of the Union Message when he urged legislation to prevent . . . (3) the use of economic force to decide issues arising out of the interpretation or application of existing agreements.

H.R Min. Rep. No. 80-245, at 95 (1947) *reprinted in* 1 NLRB, Legislative History of the Labor-Management Relations Act, 1947, at 355, 386 (1948) (emphasis added).

[22] S. REP. NO. 80-105, at 17-18 (1947) *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 407, 423-24 (1948) (citing *Deeney v. Hotel & Apartment Clerks' Union*, 57 Cal. App. 2d Supp. 1023, 134 P.2d

interference with contract as a viable cause of action at the time the LMRA passed in Congress. *See Imperial Ice Co. v. Rossier*, 18 Cal.2d 33, 112 P.2d 631 (1941). Prior to the enactment of the LMRA, California employers, like Granite Rock, would have had recourse for non-signatory unions' misconduct that caused violations of labor contracts.[23]

By enacting Section 301, Congress did not intend to strip away that right. Rather, it intended to provide a mechanism to enforce labor contracts in every state, not just the state of California. Nothing in the legislative history suggests it intended to limit state law claims for contractual interference and inducement, or otherwise shield non-signatories from liability. In fact, the Senate cited repeatedly California case law as an example of potential remedies for misconduct by unincorporated labor unions.[24] Such action suggests that Congress expected California's state law cause of action would be subsumed within Section 301(a)'s jurisdictional mandate.

Granite Rock's proposed cause of action against IBT for causing the breach of the Agreement fits squarely within Section 301(a)'s intent, i.e., the intent to curb labor unrest and strikes in violation of no-strike provisions in labor contracts. The

---

328, 330-31 (1943) (permitting suit against labor organizations under California Code of Civ. Proc. § 388).

[23] As discussed *infra*, Section 301 preempts state claims that require interpretation of a collective bargaining agreement's terms, such as its no-strike provisions. *See Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 409 (1988).

[24] S. REP. NO. 80-105, at 16-18 (1947) *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 422-24 (1948).

legislative history of Section 301(a) thus supports and is consistent with recognizing a cause of action against a non-signatory (here, an international labor organization) that caused and induced a contract violation. Congress' intent was to facilitate enforcement of labor contracts, not shield non-signatory parties from all lawsuits.

D. Section 301(a) Mandates Federal Courts To Fashion Appropriate Common Law Claims And Remedies Primarily Drawing Upon Contract Law But Occasionally Incorporating Other Legal Principles If Needed To Enforce Labor Contracts.

The Ninth Circuit's decision sets forth a bright line test, improperly narrowing what federal common law causes of action may be recognized under Section 301(a). If the cause of action is based, even in part, on theories of inducement of breach or interference, the Ninth Circuit rejects the action regardless of whether it supports national labor policy, the enforcement of labor contracts, or industrial peace. To reach this conclusion, the Ninth Circuit principally relies on IBT's non-signatory status, finding that it "has no rights or duties under the agreement," and therefore Section 301(a) jurisdiction cannot apply. (JA 49.) The Ninth Circuit's decision, however, is not supported by the statute's language. Its decision erects a false dichotomy between breach of contract and other actions and interprets Section 301(a) narrowly, contrary to this Court's previous pronouncement in *Smith*, 371 U.S. at 200-01.

In effect, the Ninth Circuit holds that because IBT did not sign the Agreement, IBT is absolved

from any and all legal responsibility for its actions that directly deprived Petitioner of the benefit of the bargained-for Agreement's inclusive no-strike provision.[25] The no-strike provision is not an ancillary benefit; it is a provision fundamental to Granite Rock's business and to the Agreement's purpose. The no-strike provision ensures industrial peace throughout the term of the contract. In exchange, Granite Rock provided valuable consideration, including improved employee wages, working conditions, and benefits.

Without protection from outside parties whose actions directly induce a breach of a labor contract, employers are left extremely vulnerable and with diminished remedies, especially when the breach is induced by the union's parent labor organization for its own gain. This case serves as a quintessential example. Granite Rock and Local 287 completed negotiations and Local 287's members approved the contract. Thereafter, the IBT instructed members to begin a new strike and directed its Local not to honor its Agreement. Local 287 was in no position to

---

[25] The "Strike and Lockout" provision of the Agreement requires interpretation. (JA 439-40.) It not only prohibits Local 287 from most forms of strikes, it establishes a 15-day waiting period for other types of strikes, with the exception of certain types of strikes if sanctioned by Joint Council of Teamsters No. 7. (*Id.*) The provision requires also affirmative action by Local 287 if employees or a group of employees engaged in the prohibited strike. (*Id.*) Granite Rock believes the strike in this case to be a violation, but a determination must be made about the type of strike engaged in by IBT and Local 287 and members, and whether it was prohibited.

disregard the command of its parent union since, at the time, Local 287 owed IBT approximately $1.2 million. IBT, therefore, financially "exerted actual control over . . . Local 287." (JA 315.)

The Ninth Circuit did not dispute the harm caused nor the adverse impact on the national labor policy to promote industrial peace. It disagreed that the no-strike provision imposes a responsibility on a non-signatory labor organization even if that union is able to mandate the contract violation. In this case, IBT effectively displaced Local 287 by directing it to strike and calling employees to instruct them not to return to work. But for IBT's demand for an immunity agreement, the contract would not have been breached. Nonetheless, the Ninth Circuit read the "plain language" of Section 301(a) to prohibit jurisdiction because "the underlying agreement must have created the rights or liabilities which the parties seek to vindicate by their suit." (JA 50.) (emphasis omitted). This effectively prohibited consideration of Granite Rock's explicit no-strike rights under the Agreement.

The fact that Granite Rock's claim is based, in part, on a theory of inducement/interference should not dissuade this Court from recognizing its cause of action against IBT.[26] As alluded to above, the Ninth

---

[26] The action for inducement of a contract violation is well-established, and traces back to Nineteenth Century English courts. *See Lumley v. Gye*, (J. Crompton) 118 Eng. Rep. 749, 752-53 (Q.B. 1853) ("[I]t must now be considered clear law that a person who wrongfully and maliciously, or which, is the same thing, with notice, interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, . . . whereby the master is injured, commits a wrongful act for which he is responsible at law.").

Circuit's decision creates an artificial dichotomy between contract and tort law and all other legal principles. As described by one legal commentator, "the body of tort doctrine is . . . 'a field which pervades the entire law.' . . . [T]ort law intersects with contract doctrine, and tortious interference [and inducement] claims explicitly unite the two bodies of law." Rebecca Bernhard, *The Three Faces Of Eve: Tortious Interference Claims In The Employment-At-Will Setting*, 86 Minn. L. Rev. 1541, 1549 (2002).

This Court has authority under Section 301(a) to develop federal common law to ensure uniform enforcement of labor contracts and has already utilized both tort and contract principles to fashion causes of action and remedies to address the specific facts before it.[27] *See Hechler*, 481 U.S. 851, 860-61

---

[27] This Court also has recognized causes of action or remedies, sounding in tort and contract, in other contexts, as well. *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 263 (1999) (an equitable lien is a hybrid cause of action, through which a party may seek legal and equitable relief); *The John G. Stevens*, 170 U.S. 113, 125-26 (1898) (recognizing a lien as a hybrid of both tort and contract law). Likewise, state supreme courts and circuit courts have, on numerous occasions, recognized hybrid tort and contract causes of action. *Digicorp, Inc. v. Ameritech Corp.*, 262 Wis. 2d 32, 62 (2003) (permitting party to a contract alleging fraud in the inducement to pursue either tort or contract remedies); *Buckley v. Trenton Saving Fund Soc'y*, 111 N.J. 355, 362 (1988) ("We conclude that the wrongful dishonor is a hybrid cause of action, and that characterizing it as tort or contract is not as important as identifying the elements of the cause of action and the recoverable damages."); *Stephan v. GAF Corp.*, 242 Kan. 152, 159-60 (1987) (the cause of action for implied warranty sounds in both contract and tort); *Johnson v. Healy*, 176 Conn. 97, 100 (1978) (a warranty claim can be "viewed as a contract action, a tort action, or a hybrid of the

(court had jurisdiction over union member's state law tortious breach of contract claim); *DelCostello*, 462 U.S. at 165 (acknowledging the dual nature of duty of fair representation and breach of contract claims under Section 301); *Vaca v. Sipes*, 386 U.S. 171, 188-89 (1967) (under Section 301(a) an employee may allege that his or her union breached the duty of fair representation concurrent with a breach of contract claim against his or her employer, and that "[i]f a breach of duty by the union and breach of contract by the employer are proven, the court must fashion an appropriate remedy"); *Hoosier Cardinal Corp.*, 383 U.S. 696, 706 (1966) (prescribing six-year statute of limitations for union's claim under Section 301(a)). [28]

---

two"). Circuit courts have also acknowledged hybrid causes of action that include elements of contract and tort. *See, e.g., Eckard Brandes, Inc. v. Riley*, 338 F.3d 1082, 1086 (9th Cir. 2003) (a claim for a breach of an employee's duty of loyalty is a "hybrid" of tort and contract; the court reasoned, "[u]nder the Restatement, the employer has a cause of action either in tort or for breach of contract when the employee violates the duty"); *Polo Ralph Lauren, L.P. v. Tropical Shipping & Construction Co., Ltd.*, 215 F.3d 1217, 1220-21 (11th Cir. 2000) (claims under the Carriage of Goods by Sea Act include elements of contract and tort); *Puerto Rico Aqueduct & Sewer Authority v. Constructora Lluch, Inc.*, 169 F.3d 68, 79 (1st Cir. 1999) (upholding the district court's treatment of a tort/contract hybrid claim, stating "[i]n numerous instances, the [district] court used hybrid language that makes it clear that it entertained both contract and tort theories and remedies in this case, and properly so"); *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1291 (9th Cir. 1987) (breach of the covenant of good faith and fair dealing is an "unusual tort action" because its "hybrid" nature "sounds in tort or contract depending upon the facts of the case").

[28]Throughout these proceedings, IBT has cited this Court's decision in *Carbon Fuel Co. v. United Mine Workers of Am.*,

Likewise, circuit courts of appeal have applied other common law theories and remedies to rectify non-signatories' misconduct under Section 301(a). *See Brown v. Sandimo Materials*, 250 F.3d 120, 128 (2d Cir. 2001) (remanding for jury trial on joint and several liability of possible single employer or alter ego non-signatory employer entities in breach of contract action for unpaid pension contributions); *Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheel Corp.*, 868 F.2d 573, 577 (3d Cir. 1989) (remanding for a determination on alter-ego status of corporate subsidiaries in a union's efforts to proceed to arbitration against both the signatory and non-signatory entities); *Int'l Bhd. of Elec. Workers, Local 613 v. Fowler Industries*, 884 F.2d 551, 554 (11th Cir. 1989) (remanding for alter-ego and single employer determinations of non-signatory employers in an action alleging breach and tortious interference claims with respect to a pre-hire agreement); *Sheet Metal Workers Int'l Ass'n, Local No. 359 v. Arizona Mech. & Stainless, Inc.*, 863 F.2d 647, 651 (9th Cir. 1988) (remanding an arbitration award enforcement action to determine whether alter-ego or single

---

444 U.S. 212, 215-16 (1979), and contended that agency principles must apply in order for IBT to have liability. The reliance on *Carbon Fuel* is misplaced. In that case, the employer attempted to recover damages from a signatory international union caused by a wildcat strike instigated by non-signatory locals. *Id.* at 215. This Court declined to hold the signatory international liable, reasoning that it did not "authorize[], participat[e] in, or ratif[y]" the strike. *Id.* at 215-16. Unlike the international in *Carbon Fuel*, IBT, a non-signatory, directly induced the strike by instructing employees not to come to work and instructing Local 287 to strike. *Carbon Fuel* is readily distinguishable.

employer doctrines apply, binding the non-signatory employer to the signatory's labor contract).

The Third Circuit has expressly refused to exclude automatically causes of action based, at least in part, on a theory of inducement, if necessary to enforce no-strike provisions in labor contracts against non-signatories.[29] In *Wilkes-Barre Publ'g Co. v. Newspaper Guild of Wilkes-Barre, Local 120*, 647 F.2d 372, 381 (3d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982), the court recognized a claim of tortious interference with contract under Section 301(a) against a non-signatory international union.[30] *Id.* at 376. The court "analyze[d] the problem in terms of the need to enforce a collective bargaining agreement" and held that Section 301(a)

---

[29] Likewise, in Local 472 of *United Ass'n of Journeyman and Apprentices v. Georgia Power Co.*, 684 F.2d 721, 725 (11th Cir. 1982) the Eleventh Circuit recognized a claim for "tortious interference with a collective bargaining agreement." But see *Xaros v. U.S. Fidelity & Guaranty Co.*, 820 F.2d 1176, 1182 (11th Cir. 1987) (holding, without referring to *Georgia Power*, that Section 301 provides jurisdiction "only against those who are parties to the contract in issue"). As briefed extensively below, circuits handle these issues differently. Some limit Section 301(a) only to signatories while others find alternative paths for enforcing contracts involving non-signatories.

[30] Granite Rock's action principally draws from contract law principles, and seeks only contractual damages. This Court need not fully adopt the cause of tortious interference recognized by the Third Circuit in *Wilkes-Barre*. While the concept of inducement or interference may be necessary to impute liability to IBT, such liability is established separately by IBT displacing Local 287, taking control of strike activities, and instructing employees and Local 287 to violate the Agreement's no-strike provision. This Court may, in accordance with its authority under Section 301(a) fashion a remedy appropriate to the facts of this case.

jurisdiction "reaches not only suits on labor contracts, but also suits seeking remedies for violations of such contracts." *Id.* at 380 (emphasis added). The Third Circuit emphasized, "[t]he label attached to the remedy as tort or contract is not dispositive of the scope of federal common law, which under Section 301(a), it is our responsibility to create." *Id.* at 381. "A claim of tortious interference with a labor contract," is, therefore, "recognized as stating a claim under the federal common law of labor contracts." *Id.* at 380-81; *see also Nedd v. United Mine Workers*, 556 F.2d 190, 197 (3d Cir. 1977) ("It is but a small step further [from the Court's holding in *Smith*, 371 U.S. 195] that the same federal common law of collective bargaining agreements permits a suit against [the non-signatory party] which allegedly acted in concert for the destruction of the value of the bargained-for and vested contract rights.").

As the above evidences, Section 301(a) does not apply only to breach of contract actions. *Lincoln Mills* and this Court's subsequent decisions do not limit federal common law causes of action and the remedies that can be developed. Federal courts have an ability to create federal common law causes and remedies to ensure uniform enforcement of labor contracts, and impose liability on IBT for its misconduct. *See Vaca*, 386 U.S. at 188-89; *Lincoln Mills*, 353 U.S. at 457. Granite Rock's proposed action for inducing a breach of a labor contract, seeking only the same contract remedies that may be obtained against a signatory like Local 287, fits squarely within Section 301(a)'s intent to ensure the uniform enforcement of collective bargaining agreements and is consistent with the national labor

law policy to preserve industrial peace.[31] In this case, IBT's egregious interference with, and

---

[31] In effect, Granite Rock seeks parity between employers and unions. Under the law of several circuits, a union may bring a Section 301(a) action against a signatory employer and its non-signatory parent company for violation of contract, and obtain contractual remedies from both pursuant to alter-ego and single employer doctrines. *See Sheet Metal Workers Int'l Assoc., Local No. 359*, 863 F.2d at 651; *Brown*, 250 F.3d at 128; *Fowler Industries*, 884 F.2d at 554. This Court has also applied the single employer doctrine to cases concerning employers' alleged violation of the National Labor Relations Act. *See South Prairie Const. Co. v. Local No. 627, Int'l Union of Operating Engineers, AFL-CIO*, 425 U.S. 800, 802 n.3 (1976) (separate entities constitute a single employer where they comprise an integrated enterprise; controlling criteria are "interrelation of operations, common management, centralized control of labor relations and common ownership"); *Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965).

Because unions are legally separate unincorporated associations with no common ownership or control, alter-ego and single employer doctrine have not been applied to impute liability to non-signatory unions that participate in violations of contract. *See, e.g., Local 159 v. Nor-Cal Plumbing, Inc.*, 185 F.3d 978, 985 (9th Cir. 1999). The only federal appellate case found applying the single employer doctrine to a local union and its international did so when an employee, alleging a Title VII claim, asserted that she was jointly employed by both. *Childs v. Local 18, Int'l Bhd. of Elec. Workers*, 719 F.2d 1379, 1381 (9th Cir. 1983).

Without the ability to reach non-signatory unions like IBT, employers, especially those in the Ninth Circuit, are left with little relief. Petitioner believes its proposed cause of action is one that is consistent with Section 301(a). Should this Court, however, hold that an alternative action, such as the alter-ego doctrine modified to apply to parent/local union is appropriate, Granite Rock's Complaint sets forth sufficient facts to support alternative relief.

direct disregard of, Granite Rock and Local 287's Agreement warrants exercise of federal courts' Section 301 authority to create a federal common law cause of action to address this brazen wrong and preserve industrial peace.

E. Public Policy Mandates That Granite Rock Have A Remedy Under Section 301(a) For IBT's Direct Violation Of The No-Strike Provision In The Contract.

1. Without a Right To Proceed Under Section 301(a), Granite Rock Would Be Without a Remedy For Egregious Violations Of Its Labor Contract's No-Strike Provision.

One of the most fundamental maxims of the common law is that "for every wrong, there is a remedy." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."). By refusing to permit Granite Rock to proceed against IBT while acknowledging that Granite Rock's state claim against IBT is preempted by Section 301(a), the Ninth Circuit decision effectively deprives Petitioner of any remedy for IBT's misconduct.

The preemptive power of Section 301(a) is so complete that a cause of action "arises under" this section if: (1) the suit alleges labor contract violations; and (2) resolving the suit would require a court to interpret the labor agreement." *See*

Allis-Chalmers Corp., 471 U.S. at 210, 212-13 (1985); *accord Hechler*, 481 U.S. at 858-59. The form of the action is irrelevant. Only the substance of the claim, i.e., whether it alleges contract violations and resolution of the suit requires interpretation of the labor agreement, is relevant. *Allis Chalmers Corp.*, 471 U.S. at 213. As this Court explained:

> Questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of §301 by relabeling their contract claims as claims for tortious breach of contract.

Id. at 211; *see also United Steelworkers of Am. v. Rawson*, 495 U.S. 362, 371 (1990).

In *Allis-Chalmers*, 471 U.S. at 211, this Court considered whether Section 301(a) preempted an employee's state-law tort action against his employer for the alleged bad-faith handling of disability benefit payments due under a labor contract. The employee asserted that the employer and the disability insurance company intentionally failed to make benefit payments as provided for under the labor contract. The Court concluded that the employee's state tort claim was preempted because the claim was "inextricably intertwined with

consideration of the terms of the labor contract." *Id.* at 213. *See also Rawson*, 495 U.S. 362 at 371 ("Preemption by federal law cannot be avoided by characterizing the Union's negligent performance of what it does on behalf of the members of the bargaining unit pursuant to the terms of the collective bargaining contract as a state-law tort.").

Circuit courts have adhered to the aforementioned principles, holding that interference with contractual relations claims based on alleged violations of labor contracts that require their interpretation are preempted by Section 301(a). *See, e.g., Milne Employee's Ass'n v. Sun Carriers*, 960 F.2d 1401, 1411-12 (9th Cir. 1991); *Int'l Union, United Mine Workers of Am. v. Covenant Coal Corp.*, 977 F.2d 895, 897-99 (4th Cir. 1992); *Magerer v. John Sexton & Co.*, 912 F.2d. 525, 530-31 (1st Cir. 1990); *Baylis v. Marriott Corp.*, 906 F.2d 874, 877-78 (2d Cir. 1990); *Johnson v. Anheuser Busch, Inc.*, 876 F.2d 620, 624 (8th Cir. 1989). Here, IBT admitted that a state law claim for inducing a contract breach would have been preempted by Section 301(a). (JA 19.)

The foregoing raises the critical question whether Congress intended to create a "gap" under Section 301(a) that would cloak IBT in the immunity it has long sought. National labor law policy and common-sense, however, suggest the answer to the question is "no," and resoundingly support recognition of a federal common law cause of action under Section 301(a) for IBT's direct misconduct. Congress clearly intended that Section 301(a) prohibit mid-term strikes that violate a collective bargaining agreement's no-strike

provision. Providing a mechanism to prevent such strikes was the primary purpose of the statute.

Both IBT and the Ninth Circuit contend that an action against Local 287 supplies Granite Rock's remedy. (JA 19, 54.) Obviously, the displaced Local remains liable under the collective bargaining agreement; however, this begs the question of IBT's liability. The party that caused the breach is IBT, which is now attempting to shield itself from the consequences of its conduct behind an empty shell – an under-funded local that does not have assets sufficient to remedy the harm caused by the strike. *See Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 423 n. 10 (1981) (Powell, J., concurring) ("The possibility that the local will be liable may be of little practical benefit, however, because the local is often judgment proof."). This result is precisely why Section 301(a) was enacted, i.e., to create a uniform body of law for contract enforcement in federal court that reaches both labor unions and employers who engage in misconduct. Recognizing the action against IBT fulfills the core reason for Section 301(a) – it prevents mid-term strikes, and provides Granite Rock a remedy to deter further violations of its Agreement. To suggest that Congress intentionally left this gaping hole in the statute ignores Congress' express purpose for enacting Section 301(a) and defies logic.

The Ninth Circuit views Granite Rock's proposed Section 301(a) action as "extraordinary." (JA 55.) This characterization not only misstates the nature of the common law claim sought to be recognized, it overlooks the conservative remedy requested. Granite Rock asks that this Court to

fashion a remedy to address the particular conduct engaged in by IBT in a case where a non-signatory effectively displaced a signatory to the labor contract, directly causing violation of the labor contract, and doing so to procure a benefit for itself. Remedies already exist against parent employers as well as joint employers that engage in similar misconduct.[32] Granite Rock simply asks the Court to create parity.

IBT defiantly seeks complete immunity from the federal courts, much like the immunity it attempted to coerce from Granite Rock by economic force. It asserts that its third party non-signatory status prevents federal jurisdiction and that a federal common law contractual inducement action should not exist simply because some elements resemble a "tort" instead of a contract claim. At the same time, it admits there is no state law claim because of preemption. (JA 19.) IBT should not be rewarded for its egregious misconduct in directly inducing a violation of a contract and thereby procuring a benefit for itself. Fundamental fairness demands that Petitioner be afforded a remedy.

---

[32]Contrary to IBT's assertions, this Court should not be concerned that providing Granite Rock a remedy in this case may spur frequent, vexatious litigation filed only to harass international unions. Typically, when confronted with a labor contract violation, the aggrieved party first seeks injunctive relief. *See Buffalo Forge Co. v. Steelworkers of Am., AFL-CIO*, 428 U.S. 397, 407 (1976). Only when a request for injunctive relief fails, as occurred in this case, does it become necessary to seek damages for the contract violation.

2. The Ninth Circuit's Decision Provides International Unions, Like IBT, A Blueprint for Industrial Chaos And Is The Antithesis Of What Congress Intended.

If allowed to stand, the court of appeals has empowered parent unions to undermine binding, negotiated collective bargaining agreements. It is as simple as one, two, three. First, a local union with few assets signs a collective bargaining agreement. Second, a non-signatory international union wages economic warfare against the employer in direct violation of the no-strike provision in the agreement between the local union and the employer. Third, the international union claims no liability under Section 301 because it did not "sign" the collective bargaining agreement. Simultaneously, the international union asserts immunity from state-law claims based on the rationale that Section 301 preempts any claims that require a court to interpret and otherwise enforce a labor contract.

The result is the antithesis of Section 301's legislative intent and this Court's interpretation of federal courts' mandate under that statute to develop a federal common law consistent with national labor relations policy. *Lincoln Mills*, 353 U.S. at 453. Ultimately, the Ninth Circuit's holding jeopardizes peaceful labor relations fostered by adherence to collective bargaining agreements, which, in the end, fuels industrial chaos. *Id.* at 455 (Section 301(a) expressed a policy "that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only that way").

Only this Court can prevent the deleterious consequences of the decision below and its propagation. Granite Rock knows first-hand the pain and economic damage to its business, its customers, and its employees that can be inflicted when a non-signatory parent union effectively destroys a bargained-for no-strike provision. Congress undoubtedly intended to prohibit the violation of collective bargaining agreements in this manner. The Ninth Circuit's decision, however, vitiates Congress' intent and provides international unions a powerful and illicit economic weapon to use against employers that refuse to give in to their demands.

VII. CONCLUSION

For the reasons set forth above, this case should be reversed and remanded to the Ninth Circuit with instructions to reinstate Petitioner's Section 301(a) cause of action against IBT, and to return the case against Local 287 to district court to reinstate the jury verdict.

Respectfully Submitted,

Garry G. Mathiason
Counsel of Record
Alan S. Levins
Adam J. Peters
Rachelle L. Wills
Sofija Anderson
LITTLER MENDELSON
A Professional Corporation
650 California Street, 20th Floor
San Francisco, CA 94108.2693
Telephone: 415.433.1940

Arthur R. Miller
Of Counsel
New York University School of Law
40 Washington Square South
Vanderbilt Hall 409D
New York, NY 10012
Telephone: 212.992.8147

RESPONDENT'S BRIEF

(14)

No. 08-1214

Supreme Court, U.S.
FILED
OCT 26 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GRANITE ROCK COMPANY,
Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS & TEAMSTERS LOCAL 287,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT INTERNATIONAL BROTHERHOOD OF TEAMSTERS

STEPHEN P. BERZON
PETER D. NUSSBAUM *
PEDER J. V. THOREEN
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

Counsel for Respondent International Brotherhood of Teamsters

* Counsel of Record

October 26, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED FOR REVIEW

Section 301 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185(a), authorizes "[s]uits for violation of contracts between an employer and a labor organization." The question in this case is whether—in addition to providing for breach of contract claims against the parties to a labor contract—Section 301 also provides tort claims against non-parties for wrongful interference with one of the parties' performance under the contract.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	8
ARGUMENT	10
I. PETITIONER HAS WAIVED ANY SECTION 301 CLAIM AGAINST THE INTERNATIONAL FOR BREACH OF CONTRACT.	10
A. Liability For Breach Of Contract Can Be Imposed On A Parent Entity Under Agency Or Alter-Ego Principles.	10
B. Granite Rock Abandoned Any Contractual Claim That The International Is Liable As A Party To The Local 287 Collective Bargaining Agreement Through Agency Or Alter-Ego Principles.	13
II. SECTION 301 PROVIDES JURISDICTION SOLELY TO ENFORCE RIGHTS OR OBLIGATIONS THAT ARE CREATED BY CONTRACT.	17
A. The Plain Language Of Section 301 Demonstrates That It Is Limited To Claims For Breach Of Contract.	17
B. The Legislative History Supports The Interpretation Of Section 301 As Permitting Only Suits For The Enforcement Of Contractual Rights And Duties.	21

TABLE OF CONTENTS—Continued

Page

C. While The Court Has Authority Pursuant To Section 301 To Fashion A Federal Common Law Of Contract Enforcement, It Should Reject Petitioner's Invitation To Re-Write That Section To Include Tort Claims Against Non-Parties That Have No Contractual Obligations..... 32

D. Permitting Tort Claims Under Section 301 Would Require Courts To Create A Common Law Of Tort That Would Allow Parties To Evade Their Agreement To Arbitrate Disputes Over The Meaning And Application Of A Collective Bargaining Agreement, And That Could Extend Liability Not Only To Parent Unions, But To Parent Corporations, Customers Of Employers, And A Wide Range Of Other Strangers To The Collective Bargaining Agreement..... 41

E. There Is No Basis For Petitioner's Suggestion That The Court Should Disrupt The Rights And Remedies Congress Created Under Section 301... 49

CONCLUSION 52

TABLE OF AUTHORITIES

CASES Page

9 to 5 Fashions, Inc. v. Spurney, 538 So.2d 228 (La. 1989) 42
Aacon Contracting Co. v. Ass'n of Catholic Trade Unionists, 276 F.2d 958 (2d Cir. 1960), *affg and adopting* 178 F.Supp. 129, 129-30 (E.D.N.Y. 1959) 20
Accord NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960) 39
Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass'n, 670 N.W.2d 569 (Mich. Ct. App. 2003)..... 43
Aetna Health Inc. v. Davila, 542 U.S. 200 (2004)..... 51
Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985)..... 33
Alyeska Pipeline Serv. Co. v. Aurora Air Serv., Inc., 604 P.2d 1090 (Ala. 1979)..... 43
American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995)..... 51
Area Landscaping, LLC v. Glaxo-Wellcome, Inc., 586 S.E.2d 507 (N.C. Ct. App. 2003).. 44
Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009)..... 4, 5
Assoc. Imports, Inc. v. Int'l Longshoremen's Ass'n, 609 F.Supp. 595 (S.D.N.Y. 1985)... 24
Associated Gen. Contractors of Minn, 290 NLRB 522 (1988) 49
Atkinson v. Sinclair Ref. Co., 370 U.S. 238 (1962)..... 21, 33
Avco Corp. v. Machinists, 390 U.S. 557 (1968)..... 36
Baylis v. Mar-riot Corp., 906 F.2d 874 (2d Cir. 1990)..... 47

TABLE OF AUTHORITIES—Continued

	Page
BE & K Constr. Co. v. NLRB, 536 U.S. 516 (2002)	37
Beidleman v. The Stroh Brewery Co., 182 F.3d 225 (3d Cir. 1999)	48
Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007)	4, 5
Board of Governors of the Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361 (1986)	29-30
Bowers v. Ulpiano Casal, Inc., 393 F.2d 421 (1st Cir. 1968)	20, 48
Boys Market, Inc. v. Retail Clerks Union No. 770, 398 U.S. 235 (1970)	35
Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176 (7th Cir. 1993)	33
Burke v. Insurance Auto Auctions Corp., 169 S.W.3d 771 (Tex. App. 2005)	42
Carbon Fuel Co. v. United Mine Workers, 444 U.S. 212 (1979)	10
Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983)	20, 48
CGB Occupational Therapy, Inc. v. RHA Health, 357 F.3d 375 (3rd Cir. 2004)	42
Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962)	22
Chaves v. Johnson, 230 Va.112 (Va. 1985)	44
Complete Auto Transit, Inc. v. Reis, 451 U.S. 401 (1981)	*passim*
CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993)	51
Dean v. United States, 129 S.Ct. 1849 (2009)	17

TABLE OF AUTHORITIES—Continued

Page

Decoe v. General Motors, Corp., 32 F.3d 212 (6th Cir. 1994) 48
Deeney v. Hotel & Apt. Clerks' Union, 134 P.2d 328 (Cal. App. Dep't Super. Ct. 1943) 28
DiGiorgio Cop. v. Mendez & Co., Inc., 230 F. Supp. 2d 552 (D.N.J. 2002) 43, 44
Dougherty v. Parsec, Inc., 872 F.2d 766 (6th Cir. 1989) 48
Fraser v. Bovino, 721 A.2d 20 (N.J. Super. Ct. App. Div. 1998) 43
Greenblatt v. Delta Plumbing & Heating Corp., 68 F.3d 561 (2d Cir. 1995) 20
Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974) 25
Hallman v. Wood, Wire & Metal Lathers' Int'l Union, 15 S.E.2d 361 (N.C. 1941) 21
Harman v. Heartland Food Co., 614 N.W.2d 236 (Minn. Ct. App. 2000) 43
Harrison v. NetCentric Corp., 744 N.E.2d 622 (Mass. 2001) 43
Highway & City Freight Drivers, Local No. 600 v. Gordon Transps., Inc., 576 F.2d 1285 (8th Cir. 1978) 11
Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976) 33
Hroch v. Farmland Indus., Inc., 548 N.W.2d 367 (Neb. Ct. App. 1996) 43
Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999) 17
Imperial Ice Co. v. Rossier, 112 P.2d 631, 18 Cal.2d 33 (1941) 29, 50

TABLE OF AUTHORITIES—Continued

Page

INS v. Cardoza Fonseca, 480 U.S. 421 (1987) 25
Int'l Bhd. of Elec. Workers v. Hechler, 481 U.S. 851 (1987) 22, 33, 34
Int'l Union, Mine Workers v. Covenant Coal Corp., 977 F.2d 895 (4th Cir. 1992) 20, 48
J.J. Indus., LLC v. Bennett, 71 P.3d 1264 (Nev. 2003) 43
Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n, 457 U.S. 702 (1982) 25
Jaffee v. Redmond, 518 U.S. 1 (1996) 44
Johnson v. Anheuser Busch, Inc., 876 F.2d 620 (8th Cir. 1989) 48
Jones v. Hildebrant, 432 U.S. 183 (1977) 16
Kimbro v. Pepsico, Inc., 215 F.3d 723 (7th Cir. 2000) 78
Lawless v. Brotherhood of Painters, 300 P.2d 159 (Cal. App. 1956) 29
Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988) 35-36
Livadas v. Bradshaw, 512 U.S. 107 (1994) . 36
Local 1976, United Bhd. of Carpenters v. NLRB, 357 U.S. 93 (1958) 26
Lodge 76, Int'l Ass'n of Machinists v. Wisc. Employment Relations Comm'n, 427 U.S. 132 (1976) 50
Loss v. Blankenship, 673 F.2d 942 (7th Cir. 1982) 20, 47
Lumpkin v. Envirodyne Indus., Inc., 933 F.2d 449 (7th Cir. 1991) 11
Magerer v. John Sexton & Co., 912 F.2d 525 (1st Cir. 1990) 47

TABLE OF AUTHORITIES—Continued

	Page
Marbury v. Madison, 5 U.S. 137 (1803)	49
Mason v. Wal-Mart Stores, Inc., 969 S.W.2d 160 (Ark. 1998)	43
Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985)	51
McLinden v. Coco, 765 N.E.2d 606 (Ind. Ct. App. 2002)	43
Milam v. Settle, 32 S.E.2d 269 (W. Va. 1944)	21
Milne Employees Association v. Sun Carriers, Inc., 960 F.2d 1401 (9th Cir. 1991)	6, 48
Neider v. Franklin, 844 So.2d 433 (Miss. 2003)	43
NLRB v. Drivers Local Union No. 639, 362 U.S. 274 (1960)	26
NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963)	38
NLRB v. Local 542, Int'l Union of Operating Eng'rs, 329 F.2d 512 (3d Cir. 1964)	11
Ocean State Phys. Health Plan, Inc. v. Blue Cross & Shield of Rhode Island, 883 F.2d 1101 (1st Cir. 1989)	44
Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726 (1998)	16
Painting & Decorating Contractors Assoc. of Sacramento, Inc. v. Painters & Decorators Jt. Comm. of the East Bay Counties, 707 F.2d 1067 (9th Cir. 1983)	34
Parsons v. Aaron, 849 So.2d 932 (Ala. 2002)	43
Phoenix Canada Oil Co. v. Texaco, Inc., 842 F.2d 1466 (3d Cir. 1988)	10

TABLE OF AUTHORITIES—Continued

Page

Pierce v. Stablemen's Union, Local No. 8760, 103 P. 324, 156 Cal. 70 (1909) 29, 50
Pure Distribs., Inc. v. Baker, 285 F.3d 150 (1st Cir. 2002) 42
Quality Optical of Jonesboro, Inc. v. Trusty Optical, LLC, 225 S.W.3d 369 (Ark. 2006) 42
Quelimane Co. v. Stewart Title Guar. Co., 960 P.2d 513, 19 Cal. 4th 26 (1998) 43
Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Serv. of Mobile, Inc., 380 U.S. 255 (1965) 11
Riegel v. Medtronic, Inc., 552 U.S. 312, 128 S.Ct. 999 (2008) 51
Roy v. Coyne, 630 N.E.2d 1024 (Ill. App. Ct. 1994) 43
San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) 39, 50
Scruggs, Millette, Bozeman & Dent, P.A. v. Merkel, 910 So. 2d 1093 (Miss. 2005) 44
Service, Hospital, Nursing Home & Pub. Employees Union, Local No. 47 v. Commercial Prop. Servs., Inc., 755 F.2d 499 (6th Cir.), *cert. denied*, 474 U.S. 850 (1985) 20, 47
Sheaffer v. State ex rel. Univ. of Wyo., 202 P.3d 1030 (Wyo. 2009) 43
Sinclair Oil Corp. v. Oil Workers Int'l Union, 452 F.2d 49 (7th Cir. 1971) 21
Smith v. Evening News Ass'n, 371 U.S. 195 (1962) 33

TABLE OF AUTHORITIES—Continued

Page

South Prairie Constr. Co. v. Local No. 627, Int'l Union of Operating Eng'rs, 425 U.S. 800 (1976) 50-51

Square D Co. v. United Elec. Workers, 123 F.Supp. 776 (E.D. Mich. 1954) 41

St. Mary's Hosp. of Athens, Inc. v. Radiology Prof. Corp., 421 S.E.2d 731 (Ga. Ct. App. 1992) 44

Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960) 36

Steinbach v. Dillon Cos., 253 F.3d 538 (10th Cir. 2001) 47

Streib v. Int't Bhd. of Boilermakers, 76 S.W.2d 400 (Mo. 1934) 21

Taylor Milk Co. v. Int'l Bhd. of Teamsters, 248 F.3d 239 (3d Cir. 2001) 24

Teamsters Local 287, Int'l Bhd of Teamsters and Granite Rock Co., 347 NLRB No. 32 (2006) 2

Teamsters Nat'l Auto Transporters Indus. Negotiating Comm. v. Troha, 328 F.3d 325 (7th Cir. 2003) 18

Texas Beef Cattle Co. v. Green, 921 S.W.2d 203 (Tex. 1996) 43

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) ..... *passim*

Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Automobile Workers, 523 U.S. 653 (1998) ...17-18, 19, 34, 40

Turner v. Federation of Teachers Local 1565, 138 F.3d 878 (11th Cir. 1998) 47

TABLE OF AUTHORITIES—Continued

Page

United Ass'n of Journeymen v. Local 334, United Ass'n of Journeymen, 452 U.S. 615 (1981) 22
United Food & Commercial Workers Union v. Quality Plus Stores, Inc., 961 F.2d 904 (10th Cir. 1992) 20, 48
United Mine Workers v. Pennington, 381 U.S. 676 (1965) 38
United States v. Hutcheson, 312 U.S. 219 (1941) 38
United Steelworkers v. Rawson, 495 U.S. 362 (1990) 34, 51
United Truck Leasing Corp. v. Geltman, 551 N.E.2d 20 (Mass. 1990) 43
Vaca v. Sipes, 386 U.S. 171 (1967) 45
Walker v. Grand Int'l Bhd. of Locomotive Eng'rs, 199 S.E. 146 (Ga. 1938) 21
Whelan v. Colgan, 602 F.2d 1060 (2d Cir. 1979) 35
White Plains Coat & Apron Co., Inc. v. Cintas Corp., 8 N.Y.3d 422 (N.Y. 2007) ... 44
Williams v. Taylor, 529 U.S. 420 (2000) 17
Winkler v. V.G. Reed & Sons, Inc., 638 N.E.2d 1228 (Ind. 1994) 44
Wooddell v. International Bhd. of Elec. Workers, Local 71, 502 U.S. 93 (1991) 22
Xaros v. U.S. Fid. & Guar. Co., 820 F.2d 1176 (11th Cir. 1987) 20
Zane v. Int'l Hod Carriers Union, 122 P.2d 715 (Kan. 1942) 21

RULES

Federal Rules of Civil Procedure Rule 54 ... 5
Sup. Ct. R. 24.1 (a) 16

TABLE OF AUTHORITIES—Continued

Page

STATUTES

29 U.S.C. §§ 101 et seq. 37
29 U.S.C. § 141(b) 29
29 U.S.C. § 158 ..... 23, 29, 35, 49, 50
29 U.S.C. § 185 (301) ..... *passim*
29 U.S.C. § 187 (303) 24, 29

OTHER AUTHORITIES

NLRB, Legislative History of the Labor-Management Relations Act, 1947 (1948) ..... *passim*
27 A.L.R. 786 (1923) 21
92 Cong. Rec. 838 (1946) 22, 23
92 Cong. Rec. 5705 (1946) 23
92 Cong. Rec. 5930 (1946) 28
92 Cong. Rec. A3304 (1946) 23
92 Cong. Rec. A3306 (1946) 21
93 Cong. Rec. 3955 (1947) 22
93 Cong. Rec. 4390 (1947) 23
93 Cong. Rec. 5146 (1947) 21, 23
93 Cong. Rec. 6378 (1947) 31
93 Cong. Rec. 6380 (1947) 31
93 Cong. Rec. A2377 (1947) 22
93 Cong. Rec. A3232 (1947) 22
Black's Law Dictionary (abridged 6th ed., 1991) 36
Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 274 (1948) 13
Conf. Rep. No. 80-510 (1947) 27, 31
Dean Dinwoodey, *"Responsibility" Demanded of Unions*, N.Y. Times, July 25, 1937 21

TABLE OF AUTHORITIES—Continued

Page

Dan B. Dobbs, *The Law Of Torts* § 446 (2001) 43, 45
Elkouri & Elkouri, *How Arbitration Works* (Alan Miles Ruben ed., 6th ed. 2003) 35, 45
Federal Mediation & Conciliation Service, 2008 Annual Report 7 (2008) 42
The Developing Labor Law (John E. Higgins, Jr., ed., 5th ed. 2006) 38
H.R. 3020, 80th Cong. (1947) 24-25, 26-27
H.R. 4908, 79th Cong. (1946) 27-28
H.R. Rep. No. 80-245. 41
H.R. Min. Rep. No. 80-245 (1947) 31
Richard A. Lord, *Williston on Contracts* § 1:1 (4th ed. 2007) 35
Prosser & Keeton On Torts: Lawyer's Edition §§ 129, 130 (W. Page Keeton, ed., 5th ed. 1984) 15, 39, 42
Restatement (Second) of Contracts (1981) ... 35
Restatement (Second) of Torts, § 1 (1965) 37
Restatement (Second) of Torts, § 766A-C (1977) 6, 15, 37
Restatement (Second) of Torts § 774A(2) (1977) 45
Restatement (Second) of Torts, Div. Nine (1977) 15, 39
S. Rep. No. 80-105 (1947) 21, 22, 23, 28, 30

IN THE

Supreme Court of the United States

No. 08-1214

GRANITE ROCK COMPANY,
Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS & TEAMSTERS LOCAL 287,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT INTERNATIONAL BROTHERHOOD OF TEAMSTERS

STATEMENT OF THE CASE

The abbreviated discussion in Petitioner Granite Rock's brief of the procedural history of this case conspicuously omits information relevant to the merits of Petitioner's current claim.

This case arises from a labor dispute between Teamsters Local 287 and Granite Rock regarding the re-negotiation of their collective bargaining agreement ("CBA") that expired in April 2004. JA 307-08. After the parties were unable to resolve their differences, Local 287's members struck in June 2004. JA 308-09.

On July 2, 2004, the parties reached a tentative agreement regarding some or all of the terms of a new CBA. JA 309-10. The parties also discussed a "back-to-work" agreement aimed at resolving various disputes arising from the strike, but deferred finalizing its terms. JA 310. Such an agreement was never concluded. JA 312-13.

On July 2, Local 287 agreed to remove its pickets and present the tentative CBA to its members for ratification. Granite Rock alleges, and Local 287 denies, that the CBA was ratified that day. JA 310-11; *see* JA 367. Local 287 resumed its strike on July 6. JA 311-13.[1]

On July 9, 2004, invoking Section 301, Granite Rock filed a breach of contract action against only Local 287. Dkt. #1.[2] The initial complaint alleged that by remaining on strike after July 2, Local 287 violated the no-strike provision in the new CBA that Granite Rock claims was ratified on that date. JA 62-67. Granite Rock subsequently filed its First Amended Complaint on July 23, 2004, and sought a temporary restraining order, again only against Local 287. JA 70-79; Dkt. #5.

Respondent International Brotherhood of Teamsters ("International") was first named as a defendant in Granite Rock's Second Amended Complaint filed on

---

[1] Granite Rock filed an unfair labor practice charge against Local 287 with the National Labor Relations Board. After trial, the Board concluded that Local 287 did not ratify the new agreement until August 22, 2004, but that the contract should be retroactive to July 2, 2004. *Teamsters Local 287 (Granite Rock)*, 347 NLRB No. 32 (2006), *enf'd*, 293 Fed.App. 518 (9th Cir. 2008).

[2] All docket citations refer to the district court's docket.

February 17, 2006, nineteen months after the case began and on the eve of trial between Granite Rock and Local 287. *See* Dkt. #1, 110. That complaint contained only one claim for relief, against both defendants, *for breach of contract*, JA 251-56, and asserted that the International was equally liable for the breach because of an alleged "agency relationship" between it and Local 287. JA 251, 256.

The International moved to dismiss, contending that it could not be liable for breach of contract since it was undisputed that it was not a party to the alleged contract and had no obligations that arose from it. *See* Dkt. #147. Granite Rock argued that the International was actually an "undisclosed principal," and therefore was a party to the contract and liable for the alleged breach by Local 287. JA 280-90. The district court expressed skepticism about that theory, but granted Petitioner leave to file another complaint, warning counsel that he would be sanctioned if the "undisclosed principal" claim were found to be baseless. JA 281-83.

Granite Rock's Third Amended Complaint[3] totally abandoned any pretense of stating a contractual claim against the International, on an undisclosed principal or any other theory. *See* Dkt. #196 at 5:14-16 (conceding International not bound as party to the contract); Dkt. #178 at 8:6-8 ("By eschewing its earlier breach of contract action against the IBT based on an agency relationship, Granite Rock acknowledges that its Agreement is with Local 287 alone . . . ."). Instead, while the Third Amended Complaint continued to allege "Breach of Contract

[3] All future references to the "Complaint" are to the Third Amended Complaint.

Against Defendant Local 287," the only claim against the International was for "Interference/ Inducement of Breach of Contract" for "maliciously . . . interfer[ing] with the Agreement." JA 316-318.

Petitioner subsequently acknowledged that the Complaint attempted to state a "federal common law tortious interference claim under Section 301" against the International. Dkt. #178 at 4:8 (footnote omitted). Granite Rock also stated that it might still attempt to raise a breach of contract claim against the International based on an "agency legal theory," but conceded that the "factual basis needed" did not presently exist. Dkt. #178 at 6 n. 3. No such claim was raised thereafter.

The Complaint's tortious interference claim was premised on the alleged actions of Rome Aloise, Secretary-Treasurer of Teamsters Local 853, which also has a contract with Granite Rock, and whose members refused to cross Local 287's picket lines during the strike. JA 323-24; *see* Dkt. #104 at 6:8-7:24; Dkt. #178 at 2; Dkt. #169 at 4; Dkt. #99 at 4-5. Granite Rock alleged that Mr. Aloise urged Local 287 to continue the strike after July 2 in an effort to achieve the "back-to-work" agreement that would have protected the members of his local for their support of Local 287. JA 311-13, 383-84; Dkt. #178 at 2. The Complaint was threadbare as to alleged tortious interference, apart from conclusory allegations that would not pass muster under the pleading standards in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). *See, e.g.*, JA 306 (plaintiff "expect[s] that evidentiary support will be obtained"); *id.* 309 ("Plaintiff believes" an International employee was involved; "further evidentiary support will be

obtained"); *id.* 307, 308, 311. While the Complaint claimed Mr. Aloise was acting as agent for the International when he urged Local 287 to remain on strike, the only facts pleaded were that he had a business card identifying him as Administrative Assistant to the International's General President (part-time); that he was provided a cellular phone by the International; and that "Plaintiff . . . believes that discovery will show" that the International reimbursed Mr. Aloise for certain unidentified travel expenses. JA 306-07; *see* Dkt. #104 at 7:16-24. In short, the Complaint did "not 'nudge[ ] [the] claim[ ]'" of tortious interference "'across the line from the conceivable to plausible.'" *Iqbal*, 129 S.Ct. at 1950-51 (quoting *Twombly*, 550 U.S. at 570).

The International again moved to dismiss Granite Rock's claim on the ground that Section 301 does not encompass tortious interference claims against non-parties that have no rights or obligations under the contract at issue. Dkt. #186 at 15:3-14. The district court granted the motion with prejudice, "holding that a suit for tortious interference with contract does not lie under LMRA Section 301(a)." JA 332.

Granite Rock then asked the district court to certify its order for immediate appeal pursuant to F.R.C.P. 54(b). Dkt. #196. It contended that certification was proper because the order "involves a discrete legal issue that is not involved in the remaining [breach of contract] claims [against Local 287]," *i.e.*, "whether Section 301(a) encompasses claims for tortious interference against non-signatories . . . ." *Id.* at 4:11-12; 9:20-22 (quotation marks omitted). The district court certified its order because the appeal "concerns whether a plaintiff can assert a

claim for tortious interference with contract against a non-signatory to the contract." JA 337.

On appeal to the Ninth Circuit, Granite Rock acknowledged that its Section 301 claim against the International for tortious interference "derive[d] from a general rather than contractual duty." Ninth Cir. Opening Br. at 33. It argued that the district court had erroneously failed "to recognize tortious interference . . . as a valid cause of action" under Section 301. *Id.* at 67. Contrary to the position that it now takes before this Court, Granite Rock was very clear that it was seeking punitive damages. *See, e.g., id.* at 68 ("Because this action has been pled as an intentional wrongdoing, it seeks compensatory and punitive damages more associated with tortious conduct . . . ."); Ninth Cir. Reply Br. at 30.[4]

In its reply brief to the Ninth Circuit, Granite Rock again argued that the Complaint alleged ample facts to support its "interference claim," citing *Milne Employees Association v. Sun Carriers, Inc.*, 960 F.2d 1401, 1411 (9th Cir. 1991), a case involving tortious interference. Ninth Cir. Reply Br. at 11. In a footnote it cited the RESTATEMENT (SECOND) OF TORTS, § 766A-C (1977), and stated that "Granite Rock makes *only* a Section 766A type claim"—*i.e.*, "(A) intentional interference with another's performance with its own contract." *Id.* (emphasis in original).

The Ninth Circuit (Circuit Judges Gould and Bea; District Judge Sedwick) unanimously affirmed the dismissal of the International. Contrary to Petitioner's assertion, the court did not "principally rel[y] on [the International's] non-signatory status

---

[4] In the district court, Granite Rock also stated that it was seeking punitive damages. Dkt. #211 at 15:14-16.

. . . ." Pet'r Br. at 45. Rather, the court concluded that an action can be brought under Section 301 only if "the underlying agreement . . . *created* the rights or liabilities which the parties seek to vindicate by their suit." JA 50. The panel recognized that Section 301 can provide a breach of contract claim against a non-party that was "so intertwined [with a party to the contract] that one is the 'alter ego' of the other," but noted that "Granite Rock did not pursue such a theory in the district court." JA 50-51. The Ninth Circuit held that because the International "has no rights or duties under the agreement, . . . Granite Rock's tortious interference claim against [the International] does not meet the requirements of section 301(a)." JA 50. The panel rejected Granite Rock's interpretation of the legislative history of Section 301, and further rejected its invitation to fashion a federal common law tort of "tortious interference" under Section 301:

> Congress intended to improve the enforcement of bargaining agreements via the LMRA. . . . The plain language of the statute appears to require at least that rights or obligations created by a labor agreement be in contest to support a section 301(a) challenge. . . . Any "gap" that might exist in Congress's labor law design is for Congress and not for us to fill. When Congress regulates an area comprehensively, as it has done in the federal labor laws, rights and remedies can be defined and circumscribed. Congress has not left parties such as Granite Rock altogether without recourse. It has provided for remedies in labor disputes through both section 301 and the National Labor Relations Act . . . . Indeed, Granite Rock vigorously pursued actions against Local 287 in the federal courts as well

> as in the National Labor Relations Board. If Congress did not provide a remedy for Granite Rock directly against [the International] on its asserted tortious interference claim, then that is an issue to be addressed by Congress, not by an extraordinary and outlier interpretation of the governing statute.

JA 54-55. Granite Rock sought review *en banc*, but no judge voted to hear the case.

SUMMARY OF THE ARGUMENT

Section 301 permits claims for breach of a CBA. Granite Rock initially attempted to state such a breach of contract claim against the International, but later abandoned it in the district court in favor of a claim for tortious interference. The Ninth Circuit followed the law of eight other circuits and held that Section 301 does not authorize tort claims.

The plain language of the statute demonstrates that the Ninth Circuit was correct that Section 301 is limited to claims for breach of contract. Section 301 provides federal courts with jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization." A suit against a non-party to a CBA, that owes no duty created by that contract, is not a "suit[ ] for violation of contract[ ]." Granite Rock's broad reading expands Section 301 far beyond the Court's prior interpretations of its plain language.

The legislative history of Section 301 demonstrates that Congress intended only to create a federal claim for the enforcement of contracts between unions and employers because state laws generally made it difficult, if not impossible, for a signatory-employe[illegible] to sue a signatory-union to enforce the parties' [illegible]

Congress did not, however, intend to create tortious interference claims in Section 301 against non-party parent employers or parent unions that have no duties that are created by the CBA. Congress created tort-like claims in other sections of the LMRA, but they are not applicable to the conduct Petitioner alleges against the International. In fact, Congress considered, but rejected, creating a remedy for that precise type of conduct.

While the Court has authority to fashion a common law of contract enforcement, it should decline Petitioner's suggestion that it rewrite Section 301 to include tort claims against non-parties that have no contractual obligations. Torts involve issues of public policy, but Congress has determined that it should decide important substantive labor law rights and remedies through statutes over which the National Labor Relations Board has the primary enforcement responsibility. Permitting courts to create a common law of tort would be contrary to Congress's explicit decision that labor policy should not be fashioned by courts applying common law concepts.

There is no basis for the Court to disrupt the rights and remedies Congress created in Section 301. Granite Rock already has a contractual breach of contract claim that it can pursue against Local 287 pursuant to the CBA's arbitration provision; and it can enforce that provision under Section 301. It also has an unfair labor practice that it pursued against Local 287 before the National Labor Relations Board. While Petitioner cannot pursue a tortious interference claim against the International under Section 301, it is not unusual that, when Congress decided to regulate the field of labor and preempt state law causes of action, it curtailed or eliminated certain

remedies previously enjoyed by both unions and employers. That is part of the balance Congress struck, and it is for Congress (not the courts), to revisit that decision.

ARGUMENT

I. PETITIONER HAS WAIVED ANY SECTION 301 CLAIM AGAINST THE INTERNATIONAL FOR BREACH OF CONTRACT.

Before turning to the arguments in Petitioner's brief, we wish to emphasize that in accordance with clearly recognized principles of agency and alter-ego, a breach of contract claim *can* be stated under Section 301 against a parent union or parent employer based on an alleged violation of a CBA by one of its subsidiaries. Granite Rock, however, made a conscious (and proper) decision not to pursue such a claim against the International.

A. Liability For Breach Of Contract Can Be Imposed On A Parent Entity Under Agency Or Alter-Ego Principles.

It is well-established that both parent unions and parent employers can be held liable, if certain legal standards are met, for the conduct of one of their subsidiaries. Parents can be liable for breach of contract on the basis of common law agency principles. *See, e.g., Phoenix Canada Oil Co. v. Texaco, Inc.*, 842 F.2d 1466, 1477-78 (3d Cir. 1988) (parent company may be held liable for activities of its subsidiary); *Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212, 216 (1979) (international union can be liable for breach of contract to which it is signatory based on strikes by its locals). Parent entities can also be liable for breach of contract based on the actions of subsidiaries that are alter-egos of the

parent, *i.e.*, the parent and subsidiary effectively lack a separate existence.[5] Alter-ego status occurs most often with international unions when they have imposed a trusteeship over an affiliated local union, thereby running its affairs.[6]

In the context of an alleged breach of a CBA, where obligations are not established by generally-applicable public law, but rather arise voluntarily by agreement between a union and an employer, a Section 301 claim can properly be brought against an international only if it is a party to the agreement, or has otherwise assumed obligations under the contract. If, for example, Local 287 entered into the CBA with Granite Rock *on behalf of the International*, a Section 301 breach of contract claim properly could be brought against the International based on agency principles because it would be a party to the CBA and bound to the obligations created by it. *Cf.* 29 U.S.C. § 185(b) (unions liable for acts of agents). Similarly, a Section 301 breach of contract claim could properly be brought against the International if it was an alter-ego of Local 287 and therefore also was bound by the obligations in the agreement.[7]

---

[5] *See, e.g., Lumpkin v. Envirodyne Indus., Inc.*, 933 F.2d 449 (7th Cir. 1991). The relevant factors to establish alter-ego status include common management, centralized control, interrelation of operations, and common ownership. *See Radio & Television Broad. Technicians Local Union 1264 v. Broadcast Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965).

[6] *See, e.g., NLRB v. Local 542, Int'l Union of Operating Eng'rs*, 329 F.2d 512, 514-15 (3d Cir. 1964) (international may be liable for unfair labor practices committed by representative of international-appointed trustee who effectively controlled local).

[7] *See Highway & City Freight Drivers, Local No. 600 v. Gordon Transps., Inc.*, 576 F.2d 1285, 1292 (8th Cir. 1978) (employ-

In other words, when there is an alleged breach of a CBA that on its face is between a *local union* and an employer, a Section 301 claim can properly be brought against an international only if the international (directly, or through its agent or alter-ego) assumed obligations under the contract *and* violated those obligations (again, directly or through its agent or alter-ego). *See* Pet'r Br. at 50-51. As labor law professor Archibald Cox noted soon after the enactment of Section 301 in 1947:

> If the collective bargaining agreement is between the employer and the local union as principal, so that *no promise is made* by the international, the international should not be liable. On other hand, *if there is a promise* by the international that it will not cause, engage in, or support any [work] stoppage during the life of the agreement, then the liability of the international would depend on (1) whether the local engaged in the strike at least partly for the purpose of furthering the interests of the international, and (2) whether the local's activities were of the same general nature as those in which it was authorized to engage on behalf of the international. The answers to these questions would depend on the precise relationship between the two unions and the amount of discretion vested in the local. It is submitted, however, that *the relationship should ordinarily be regarded as similar to that which exists between parent corporation and subsidiary, and that in dealing with local affairs, including local strikes and boycotts, a local union*

---

ers can seek relief against international under respondent superior or alter-ego theory for breach of contract by local).

> *ordinarily acts as a separate entity in pursuit of its own affairs.*

Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 274, 311-12 (1948) (footnote omitted; emphasis added).

B. Granite Rock Abandoned Any Contractual Claim That The International Is Liable As A Party To The Local 287 Collective Bargaining Agreement Through Agency Or Alter-Ego Principles.

Petitioner now suggests that it is asserting a breach of contract claim against the International based on principles of agency or alter-ego. First, it contends (contrary to its position below) that it is seeking only contract damages.[8] Second, Petitioner repeatedly claims that the International somehow exercised complete control over Local 287 and "displaced" it as a separate entity, intimating that the International became the local's alter-ego.[9] Finally, Petitioner suggests that it should be allowed to

---

[8] *Compare* Pet'r Br. at 32 ("action for contractual damages"), 51 n.30 ("seeks only contractual damages") *with* Dkt. #211 at 15:14-16, Ninth Cir. Opening Br. at 68, Ninth Cir. Reply Br. at 30 (seeking punitive damages) *and* note 4, *supra*.

[9] *See, e.g.*, Pet'r Br. at i ("effectively displaces its signatory local union and causes a strike"); 32 (International caused breach "by displacing Local 287 and directly causing a violation"); 37 n.12 ("IBT . . . displaced Local 287"; "IBT violated the contract"); 46-47 ("Local 287 was in no position to disregard the command of" the International); 47 ("IBT effectively displaced Local 287"); 51 n.30 ("IBT displac[ed] Local 287, taking control of strike activities, and instructing employees and Local 287 to violate the Agreement's no-strike provision"); 57 (referring to Local 287 as "the displaced Local" and stating that the International "caused the breach").

proceed on an alter-ego theory in order to achieve "parity between employers and unions," since unions can pursue Section 301 actions against parent employers "pursuant to alter-ego and single employer doctrines." Pet'r Br. at 53 n.31; *see also id.* at 58.[10]

Granite Rock should not be allowed to pursue a contractual claim against the International because it abandoned any such claim in the district court and did not raise the issue on appeal. As noted *supra*, when the district court granted Granite Rock leave to re-plead a contractual claim based on its theory of "undisclosed principal," Petitioner failed to do so. Instead, its Third Amended Complaint asserted an "Interference/Inducement of Breach of Contract" against the International, while retaining a "Breach of Contract" claim only against Local 287. *Compare* JA 317 *with* JA 316. Although Granite Rock suggests that its claim against the International might be characterized as a "hybrid" contract/tort claim, it repeatedly acknowledged to both the district court and the Ninth Circuit that its *only* claim against the International in the Third Amended Complaint was for "tortious" conduct. *See, e.g.*, 9th Cir. Opening Br. at 13 n.4, 15, 30, 33, 35, 38, 62; 9th Cir. Reply Br. at 11 n.6, 24; Dkt. #178 at 1:4-5 (asserting "claim of federal common law tortious interference"); *id.* at 4:8-

---

[10] Unions and employers already enjoy parity to proceed against one another's parent entities. The suggestion that employers cannot establish alter-ego liability against unions "[b]ecause unions are legally separate unincorporated associations with no common ownership or control" (Pet'r Br. at 53 n.31), simply assumes a factual scenario that might not provide the basis for alter-ego liability. *See* n.5, *supra*. But as noted above, alter-ego liability *can* exist against an international union when it and its local effectively are *not* separate entities because there *is* common control. *See* n.6, *supra*.

9 & n.2; *id.* at 5:22-26; *id.* at 8:2-4; *see* Dkt. #178 at 10:6-13 (arguing that "tort" claims must be cognizable under Section 301). That is clearly how both the district court and the Ninth Circuit viewed and analyzed Petitioner's claim. *See, e.g.*, JA 49, 54-55, 330-32.[11]

In sum, because Granite Rock is now claiming that the International breached *contractual obligations* that it had under an agency or alter-ego theory, Petitioner is improperly seeking to litigate claims it could have pleaded but consciously abandoned in the district court, and therefore were not considered by either that court or the Ninth Circuit. In Granite Rock's own words, its Third Amended Complaint "eschew[ed] its . . . breach of contract action against the IBT based on an agency relationship" (Dkt. #178 at 8:6-8); "acknowledge[d] that its Agreement [was] with Local 287 alone" (Dkt. #178 at 8:6-8); and admitted that it lacked the "factual basis needed" to

---

[11] A breach of contract is, of course, *an element of* the tort of tortious interference with contract, but that cannot convert Petitioner's claim into some ambiguous "hybrid" that straddles contract and tort law. Tortious interference with contract is firmly rooted in a series of business torts founded on public law obligations independent of the voluntarily undertakings contained in contractual agreements. *See* RESTATEMENT (SECOND) OF TORTS Div. Nine, p. 1 (1977); *id.* Ch. 37 Introductory Note, p. 5 (there are "several forms of the tort" of interference with existing or prospective contractual relations and they "are often not distinguished by the court"); *id.* § 766 cmt. c ("inducing breach of contract is . . . but one instance . . . of protection against improper interference in business relations"); *id.* §§ 766-766C (describing various related torts); PROSSER & KEETON ON TORTS: LAWYER'S EDITION § 129 at 978 (W. Page Keeton ed., 5th ed. 1984) ("The law of interference with contract is thus one part of a larger body of tort law aimed at protection of relationships, some economic and some personal." (citations omitted)).

allege an agency theory of liability (Dkt. #178 at 6 n.3). Petitioner also noted that any liability on behalf of the International would "derive[ ] from a general rather than contractual duty" (9th Cir. Opening Br. at 33).[12] Contrary to Petitioner's suggestion (Pet'r Br. at 53 n.31), such contractual claims should not be considered by the Court because it is "legally fatal" that those claims were not raised below. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 738 (1998); *Jones v. Hildebrant*, 432 U.S. 183, 186-89 (1977) (dismissing writ of certiorari where petitioner sought to litigate claim that was not asserted in complaint or litigated below).

Moreover, to the extent that certiorari was granted to consider whether an international union or parent employer can be liable for tortious interference under Section 301, Granite Rock has now abandoned that claim in its merits brief. Thus, the Court should find that certiorari was improvidently granted. *See* Supreme Court Rule 24.1 (a).[13]

---

[12] In contrast, when defending its earlier Second Amended Complaint, Granite Rock argued that the IBT exercised "substantial control over Local 287" and Granite Rock sought to hold the IBT "vicarious[ly] and direct[ly]" liable for the alleged breach. Dkt. #155 at 5:14-19.

[13] Indeed, if Granite Rock only seeks "contractual damages" because the International allegedly "displaced [Local 287 as] a signatory to the labor contract, directly causing a violation of the labor contract," Pet'r Br. at 51, n.30, 58, its only possible Section 301 claim against the International would have been to enforce the grievance and arbitration provisions of the CBA regarding the International's alleged breach of the no-strike clause. Petitioner was required to file *a timely contractual grievance* against the International (which it did not), since its breach of contract claim constitutes a "dispute[ ] arising under [the] agreement" that must be "resolved in accordance with the

II. SECTION 301 PROVIDES JURISDICTION SOLELY TO ENFORCE RIGHTS OR OBLIGATIONS THAT ARE CREATED BY CONTRACT.

A. The Plain Language Of Section 301 Demonstrates That It Is Limited To Claims For Breach Of Contract.

The issue correctly framed is whether Section 301 provides for tort claims against a non-party to a CBA that has no obligations that are created by that contract. The proper analysis of that issue begins, "'as always, with the language of the statute.'" *Dean v. United States*, 129 S.Ct. 1849, 1853 (2009) (quoting *Williams v. Taylor*, 529 U.S. 420, 431 (2000)). "And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999).

[grievance] procedure." JA 434; Pet'r Br. at 36 ("This case concerns a violation of a labor contract that requires interpretation of its multi-faceted no-strike provision to determine whether the alleged violation occurred."); *id* at 32-33 (Petitioner should have "the ability to seek the same contractual remedies from the [International] that would be available when a signatory union violates a labor contract."); *id.* at 46. Granite Rock simply ignored the dispute resolution mechanism created by the CBA to determine whether a party breached the agreement and, if so, the appropriate remedy. The district court ordered Granite Rock and Local 287 to resolve those very issues through the contract's grievance/arbitration procedure (*see* JA 381-82); and that same procedure was equally applicable if the International truly displaced Local 287 as a party to the contract. Arbitration against the International is no longer available to Granite Rock because it failed to exhaust the CBA's grievance procedure in a timely manner, which is a prerequisite to arbitration. *See* JA 437.

Section 301 provides federal courts with jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization . . . ." As the Court observed in *Textron Lycoming Reciprocating Engine Division, Avco Corp. v. United Automobile Workers*, 523 U.S. 653, 657 (1998), "'[s]uits for violation of contracts' under § 301(a) are . . . suits that claim a contract has been violated." The commonsense understanding of a suit "for violation of contracts" (or "suits that claim a contract has been violated") is a suit directed at a defendant to remedy an alleged breach of *its contractual obligation*. A suit against a non-party, that owes no duty created by the contract, is not a suit "for violation of contract[ ]." As the Ninth Circuit correctly found: "The plain language of the statute appears to require at least that rights or obligations created by a labor agreement be in contest to support a section 301(a) challenge." JA 54. As discussed *supra*, Petitioner abandoned its claim in the district court that the International violated some obligation it owed Petitioner pursuant to the CBA.

Textron instructs that Section 301's plain language should not be given a tortured construction to permit claims against a defendant that has not breached a contractual obligation. In that case, a union filed a Section 301 claim alleging that the employer fraudulently induced the union to sign a CBA. 523 U.S. at 654-55. The Court concluded that the claim was not cognizable, and rejected the argument that "suits for violation of contracts" should be read broadly to include claims that merely "*concern*[ ] a violation of contract." *See* 523 U.S. at 656 (quotation mark and citation omitted; emphasis added); *see also Teamsters Nat'l Auto Transporters Indus. Negotiating Comm. v. Troha*, 328 F.3d 325, 329 (7th Cir. 2003) (*Textron*

establishes the "narrowness" of Section 301, limiting it to "violations of contracts" (quotation marks and citation omitted)).[14]

Contrary to *Textron*, Granite Rock would have the Court interpret "suits for violation of contracts" broadly, as encompassing *any* suit concerning a violation of a labor contract, or predicated in some manner on a violation of a labor contract. *See* Pet'r Br. at 13, 33-34. Pursuant to Petitioner's proffered interpretation, all that is required to invoke federal court jurisdiction under Section 301 "is that the suit was: (1) 'filed because a contract has been violated,' and (2) the contract in question is 'between' an employer and a labor organization." *See id.* at 34 (citation omitted). But such an expansive reading

---

[14] *Textron* states that Section 301 "erects a gateway through which parties may pass into federal court; once they have entered, it does not restrict the legal landscape they may traverse." 523 U.S. at 658. The Court was not suggesting, however, that Section 301 extends beyond the enforcement of contractual rights and duties. It went on to give the following examples: "Thus if, in the course of deciding whether a plaintiff is entitled to relief for the *defendant's alleged violation of a contract*, the defendant interposes the affirmative defense that the contract was invalid, the court may, consistent with § 301(a), adjudicate that defense. Similarly, a declaratory judgment plaintiff *accused of violating a collective-bargaining agreement* may ask a court to declare the agreement invalid." *Id.* (citation omitted; emphasis added). As these examples demonstrate, the "gateway" is that the plaintiff or defendant is accused of breach of contract. Thereafter, that party may enter a "legal landscape" in which it can raise a variety of defenses that go beyond the narrow issue of whether there was a failure to comply with the terms of the contract, *e.g.*, invalidity of the contract, fraudulent inducement, etc. *See also infra* at Section II.C (discussing limitations on development of federal common law under Section 301).

would permit not only suits for tortious interference with contract, but also *any* claim that concerns or is predicated in any way on a violation of contract, even where a non-party plaintiff asserting a Section 301 claim has no rights under the contract, or where a non-party defendant has no obligations arising from the contract. Allowing such claims to be brought in federal court would dramatically expand Section 301 jurisdiction beyond the plain and limited meaning that this Court, and virtually every circuit, have given to the phrase "suits for violation of contracts," *viz.*, suits to enforce the voluntary and private rights and obligations created by the CBA itself.[15]

---

[15] In addition to the Ninth Circuit, tortious interference claims are not cognizable under Section 301 in the following circuits: *Bowers v. Ulpiano Casal, Inc.*, 393 F.2d 421, 423 (1st Cir. 1968); *Aacon Contracting Co. v. Ass'n of Catholic Trade Unionists*, 276 F.2d 958 (2d Cir. 1960), *aff'g and adopting* 178 F.Supp. 129, 129-30 (E.D.N.Y. 1959); *Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561, 572 (2d Cir. 1995); *Int'l Union, Mine Workers v. Covenant Coal Corp.*, 977 F.2d 895, 897 (4th Cir. 1992); *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 500-01 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983); *Serv., Hosp., Nursing Home & Pub. Employees Union, Local No. 47 v. Commercial Prop. Servs., Inc.*, 755 F.2d 499, 505-06 (6th Cir.), *cert. denied*, 474 U.S. 850 (1985); *Loss v. Blankenship*, 673 F.2d 942, 947-48 (7th Cir. 1982); *United Food & Commercial Workers Union v. Quality Plus Stores, Inc.*, 961 F.2d 904, 905-06 (10th Cir. 1992); *Xaros v. U.S. Fid. & Guar. Co.*, 820 F.2d 1176, 1181 (11th Cir. 1987). *See also* discussion in Section II.D., *infra*, regarding the wide range of non-parties against whom Section 301 suits could be brought pursuant to the broad reading urged by Petitioner.

B. The Legislative History Supports The Interpretation Of Section 301 As Permitting Only Suits For The Enforcement Of Contractual Rights And Duties.

1. Congress enacted Section 301 to address a clear and well-defined problem.[16] Before the LMRA was enacted in 1947, employers faced procedural difficulties suing signatory unions for breach of contract because, as unincorporated associations, labor organizations were not proper defendants in many states' courts.[17] The concern motivating Section 301

---

[16] *See generally Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 408-16 (1981) (describing legislative history); *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238, 247-48 (1962) (same); *Sinclair Oil Corp. v. Oil Workers Int'l Union*, 452 F.2d 49, 52 (7th Cir. 1971) (same).

[17] *See, e.g., Milam v. Settle*, 32 S.E.2d 269, 272 (W. Va. 1944); *Zane v. Int'l Hod Carriers Union*, 122 P.2d 715, 719 (Kan. 1942); *Hallman v. Wood, Wire & Metal Lathers' Int'l Union*, 15 S.E.2d 361, 363-64 (N.C. 1941); *Walker v. Grand Int'l Bhd. of Locomotive Eng'rs*, 199 S.E. 146, 150-51 (Ga. 1938); *Streib v. Int't Bhd. of Boilermakers*, 76 S.W.2d 400, 401-03 (Mo. 1934); *see* 27 A.L.R. 786 (1923) ("Liability of unincorporated labor organization to suit"); 92 Cong. Rec. A3306 (1946) (citing need for legislation to ensure that unions can be sued); Dean Dinwoodey, *"Responsibility" Demanded of Unions*, N.Y. Times, July 25, 1937 (describing difficulties in suing unions and calling for legislation). The difficulty suing unions led to the related problem that employers often served and sued individual union members and held them liable. *See* S. Rep. No. 80-105, at 15-16 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, 421-22 (1948) [hereinafter LEG.HIST.]; *Complete Auto Transit*, 451 U.S. at 407; *Atkinson*, 370 U.S. at 247-48; 93 Cong. Rec. 5146-47 (1947), *reprinted in* 2 LEG.HIST. at 1497 (statement of Sen. Ball). While Section 301 ensured that unions could be held responsible for breaching their contracts, it also insulated individual members from personal liability. *See* 29 U.S.C. § 185(b). Congress also intended Section

was to create "a procedure for making such agreements *enforceable* in the courts by either party." *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 453 (1957) (emphasis added); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 510 (1962); *United Ass'n of Journeymen v. Local 334, United Ass'n of Journeymen*, 452 U.S. 615, 624 (1981) ("§ 301(a) provided federal jurisdiction for *enforcement of contracts* made by labor organizations to counteract jurisdictional defects in many state courts that made it difficult or impossible to bring suits against labor organizations by reason of their status as unincorporated associations") (emphasis added); *accord*, *Wooddell v. International Bhd. of Elec. Workers, Local 71*, 502 U.S. 93, 99 (1991). By ensuring that unions, as well as employers, could be sued for breach of contract, Section 301 "'establish[ed] a *mutual responsibility* when the collective-bargaining process has resulted in a contract.'" *Complete Auto Transit*, 451 U.S. at 408 (quoting 92 Cong. Rec. 838 (1946) (statement of Rep. Case); discussing analogous provision in 1946 Case bill) (emphasis added).[18]

---

301 to create national uniformity with regard to the enforcement of labor agreements. *See Int'l Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851, 856-57 (1987).

[18] *See* 93 Cong. Rec. 3955 (1947), *reprinted in* 2 LEG.HIST. at 1014 (statement of Sen. Taft); 93 Cong. Rec. A3232 (1947), *reprinted in* 2 LEG.HIST. at 1626 (statement of Sen. Ball) ("[C]ollective bargaining cannot continue to be an important factor in our labor relations unless *both parties* are bound by their contracts." (emphasis added)); 93 Cong. Rec. A2377 (1947), *reprinted in* 2 LEG.HIST. at 1524 (statement of Sen. Ball); S. Rep. No. 80-105, at 16 (1947), *reprinted in* 1 LEG.HIST. at 422. Further evidence regarding the purpose of Section 301 comes from the history of the 1946 Case bill, which was not enacted, but which included a provision similar to Section 301. *See*

Congressional statements make clear that the purpose of Section 301 was to enforce contractual rights, not to permit tort claims against third parties who had no contractual obligations under a CBA. As stated by Senator Taft, one of the major architects of the LMRA (also known as the "Taft-Hartley Act"): "Finally, we have a provision in title III for bringing a lawsuit for breach of contract. Breach of what kind of contract? Breach of contract for collective bargaining." 93 Cong. Rec. 4390 (1947), *reprinted in* 2 LEG.HIST. at 1133. "[W]e give to employers the right to sue a union in interstate commerce, in a Federal court, for violation of contract. *It does not go beyond that*." 93 Cong. Rec. 5146 (1947), *reprinted in* 2 LEG.HIST. at 1497 (statement of Sen. Ball) (emphasis added). *Accord*, S. Rep. No. 80-105, at 15-16 (1947), *reprinted in* 1 LEG.HIST. at 421-22 ("collective agreements should be mutually binding on both parties to the contract"). *See also* Pet'r Br. at 31 ("Congress enacted Section 301 to provide for uniform federal enforcement of labor contracts.").

2. Other provisions in the LMRA further demonstrate that Section 301 is limited only to the enforcement of contractual rights and obligations. Those other sections, by contrast, create certain labor-related tort-like claims for interference with business relations. Section 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B), makes it an unfair labor practice for a labor organiza-

---

Complete Auto Transit, 451 U.S. at 410 (history of Case bill provides useful insights into the scope and purpose of Section 301); *see, e.g.*, 92 Cong. Rec. 838 (1946) (statement of Sen. Case) (among other things, Case bill "seeks to establish a mutual responsibility when the collective-bargaining process has resulted in a contract"); 92 Cong. Rec. 5705 (1946) (Sen. Taft); 92 Cong. Rec. A3304 (1946) (Sen. Ball).

tion or its agents "to induce or encourage" or to "threaten, coerce or restrain" a third party to "cease doing business" with an employer; and Section 303, 29 U.S.C. § 187, provides a federal court claim for injury to an employer's business if a union violates Section 8(b)(4). These provisions are directed at curtailing "[a] secondary boycott [which] is both effective and unlawful precisely because it disrupts the business relations of two parties. It is an interference by one party with the contractual relations of two others." *Associated Imports, Inc. v. Int'l Longshoremen's Ass'n*, 609 F.Supp. 595, 600 (S.D.N.Y. 1985). "Violations of [Section 8(b)(4)(B)] sound in tort, and are in the nature of interference with advantageous economic relations." *Taylor Milk Co. v. Int'l Bhd. of Teamsters*, 248 F.3d 239, 247 (3d Cir. 2001). Sections 8(b)(4)(B) and 303, however, do not encompass the activity allegedly engaged in by the International in this case; and Granite Rock did not file an unfair labor practice charge against the International or attempt to state a Section 303 claim against it in district court.

Even more to the point, Congress considered, but rejected, creating an unfair labor practice that would have made unlawful the very conduct Petitioner asserts the International committed. The House version of the bill that eventually became the LMRA would have made it an unfair labor practice "to *call*, authorize, engage in, *or assist* any strike . . . , an object of which is to compel the employer to accede to the inclusion in a collective-bargaining agreement of any provision which under 2 (11) is not included as a proper subject matter of collective bargaining." H.R. 3020, 80th Cong. § 101 (1947) (as passed House, April 18; proposed Section 8(b)(3) of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* ("NLRA")),

reprinted in 1 LEG.HIST. at 179 (emphasis added). But that provision was omitted from the final version of the bill.[19] "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza Fonseca*, 480 U.S. 421, 442 43 (1987) (quotation marks and citation omitted); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974) (deletion of provision "strongly militates against a judgment that Congress intended a result that it expressly declined to enact"). The Court "will not adopt by judicial fiat an interpretation that Congress specifically rejected when it enacted the 1947 amendments to the NLRA." *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702, 720 (1982).

In sum, in the LMRA Congress prohibited in Sections 8(b)(4)(B) and 303 certain forms of interfe-

---

[19] Section 2(11) of the House bill set forth mandatory subjects of bargaining. H.R. 3020, 80th Cong. § 101 (1947) (as passed in House on April 18; proposed Section 2(11) of the NLRA), *reprinted in* 1 LEG.HIST. at 166-67. The "back-to-work" agreement, that the International allegedly sought and that allegedly was the reason it called for the strike against Granite Rock to continue (Pet'r Br. at 32, 37 n.12 & 47), would have protected employees outside of the Local 287 bargaining unit, as well as other Teamster Locals, for their support during the strike. *See* JA 383-84, ¶¶ 3-5 (granting amnesty to "supporters and sympathizers or . . . any labor organization" and to Granite Rock "employees who are not represented by [Local 287] . . . [and] any labor organization . . . [for] honoring the picket lines of [Local 287]"). The "back-to-work" agreement would not have come within any of the enumerated mandatory subjects of bargaining contained in Section 2(11) of the House bill, and therefore the alleged conduct by the International would have been an unfair labor practice under the House bill.

rence with an employer's business relations, but specifically rejected a provision that would have prohibited non-parties (including international unions) from calling or assisting a strike over a non-mandatory subject of bargaining. That Congress considered, but declined to prohibit the exact type of conduct complained of by Granite Rock, "counsels wariness" in reading such a prohibition into Section 301 as Petitioner urges. As the Court has cautioned:

> It is relevant to recall that the [LMRA] was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation[ ] and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests. This is relevant in that it counsels wariness in finding by construction a broad policy . . . as such when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to secure its embodiment in enacted law.

NLRB v. Drivers Local Union No. 639, 362 U.S. 274, 289-90 (1960) (quoting *Local 1976, United Bhd. of Carpenters v. NLRB*, 357 U.S. 93, 99 100 (1958)).

3. In their analysis of the legislative history, Petitioner and *amicus* Associated General Contractors rely heavily on the fate of the House version of what became Section 301. Unlike the Senate bill, which stated that "[s]uits for violation of contracts . . . may be brought in any district court" (H.R. 3020, 80th Cong. § 301 (1947) (as passed Senate, May 13), *reprinted in* 1 LEG.HIST. at 279), the House bill provided that "[a]ny action for or proceeding involv-

ing a violation of [a labor] agreement . . . may be brought by either party in any district court . . . ." H.R. 3020, 80th Cong. § 302 (1947) (as passed House, April 18), *reprinted in* 1 LEG.HIST. at 221. Petitioner and its *amicus* argue that, because the final version of Section 301 contains language similar to the Senate version that omits the phrase "brought by either party," Congress made a conscious decision to broaden Section 301 to include suits against non-parties that have no contractual rights or obligations.

This argument ignores the Conference Report that reconciled the two bills and demonstrates Congress's view of their differences. The Report notes that the conference agreement "follows in general the provisions of the *House bill* with changes therein hereafter noted." Rep. No. 80-510, at 65-66 (1947), *reprinted in* 1 LEG.HIST. at 569-70 (emphasis added). The Report then lists essentially three substantive changes to the House bill that the Conference Committee adopted. *Id.* The deletion of the phrase "brought by either party" is not among them. Thus, with respect to that language the Committee saw no material difference between the two bills, and the deletion of the language cannot reasonably be interpreted as a conscious decision by Congress to broaden the scope of Section 301.[20] In fact, the language in the Senate

---

[20] Similar amendments took place in 1946 with respect to the Case bill. The provision corresponding to Section 301 would have provided that "a suit for damages for . . . breach [of a collective bargaining agreement] may be maintained *by the other party or parties*." H.R. 4908, 79th Cong. § 10 (1946) (February 8, 1946) (emphasis added). After intervening amendments, the bill was changed to read, "[s]uits for violation of a contract . . . may be brought in any district court." H.R. 4908, 79th Cong. § 10(a) (1946) (May 25, 1946). Representative Case explained that the revised wording was intended to have the

bill that was finally included in Section 301 to describe the types of claims that can be brought—"[s]uits for violation of contracts"—is *narrower* than the corresponding language in the House bill—suits "involving a violation of an agreement."

4. Granite Rock also suggests that because Congress mentioned California law when enacting Section 301, it must have intended to "federalize" *all* then-existing contract and labor law in California law. Because California generally recognized the tort of interference with contract, Petitioner concludes that Congress must have intended to include such a claim for relief under Section 301. *See also* Center on Nat'l Labor Policy Br. at 28. The legislative history is clear, however, that Congress cited California simply because it was one of the jurisdictions that had abrogated the common law rule regarding the ability to sue unincorporated associations and permitted suits against labor unions.[21] Congress noted that "until *all* jurisdictions, and particularly the Federal Government, authorize actions against labor unions as legal entities, there will not be the mutual responsibility necessary to vitalize collective-bargaining agreements." S. Rep. No. 80-105, at 17 (1947), *reprinted in* 1 LEG.HIST. at 423 (emphasis added). Congress's

---

same effect: "All this section on suability does is to carry out the same purpose we had in the House bill, when we provided for making contracts actually binding upon both parties." 92 Cong. Rec. 5930 (May 29, 1946).

[21] *See e.g.*, S. Rep. No. 80-105, at 16-18 (1947), *reprinted in* 1 LEG.HIST. at 422-24 ("some States, including California . . . , have construed statutes permitting common name suits against associations doing business to apply to labor unions"; citing *Deeney v. Hotel & Apt. Clerks' Union*, 134 P.2d 328 (Cal. App. Dep't Super. Ct. 1943) (unions can be sued under California law despite their status as unincorporated associations)).

references to California law had nothing whatever to do with the type of tort claim that Granite Rock asks the Court to recognize.

Moreover, Granite Rock overreaches in claiming that California provided "state law causes of action to hold unions liable for interfering with labor contracts." Pet'r Br. at 43. At the time, California courts had held that because of an international's relationship with locals, it was privileged to induce the breach of a local's contract with a third party. *Lawless v. Brotherhood of Painters*, 300 P.2d 159, 162 (Cal. App. 1956). In fact, the sole authority Petitioner cites for the unremarkable proposition that California *generally* permitted tortious interference claims, noted that labor unions fell within an *exception* to that rule, and could lawfully employ tactics that "have the effect of inducing breaches of contracts between employer and employee or employer and customer." *Imperial Ice Co. v. Rossier*, 112 P.2d 631, 18 Cal.2d 33, 35 (1941); *see Pierce v. Stablemen's Union, Local No. 8760*, 103 P. 324, 156 Cal. 70, 76-77 (1909) (explaining California's rejection of other jurisdictions' rules against secondary boycotts). Since California permitted precisely the type of secondary union activity that Congress intended to prohibit when it enacted Sections 8(b)(4)(B) and 303, it is clear that Congress in the LMRA was not "federalizing" all aspects of California's regulation of unions.

5. In the end, Petitioner and its *amici* are forced to fall back on a general goal of the LMRA, to minimize industrial strife. *See* Pet'r Br. at 37-39, 43 (citing the LMRA's "General Provisions," 29 U.S.C. § 141(b)); *Amicus* Center on Nat'l Labor Policy Br. at 27-28. But as the Court aptly stated in *Board of Governors*

of the Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361, 373-74 (1986):

> Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

Petitioner's reliance on a broad policy behind the LMRA ignores the precise manner in which Section 301 was meant to advance that policy. In Congress's words, Section 301 "promote[s] industrial peace *through faithful performance by the parties [of their] collective agreements . . . enforceable in the Federal courts*." S. Rep. No. 80-185 (1947), at 16, *reprinted in* 1 LEG.HIST. at 422 (emphasis added); *id.* at 17, *reprinted in* 1 LEG.HIST. at 423 ("Statutory recognition of the collective agreement as a[n] . . . enforceable contract . . . will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace."). In sum, there is no indication in the legislative history that Congress contemplated that Section 301 would contribute to industrial peace by creating federal court tort claims against parent employers and parent unions that have no duties created by a CBA.

Granite Rock's reference to a House Minority Report's discussion of "use of economic force to decide issues arising out of the interpretation or application of existing agreements" (Pet'r Br. at 42-43 n.21), is not proof that Section 301 was intended to encompass tortious interference claims. In fact the Minority Report was not addressing Section 301 or its purposes at all, but rather was directed to a completely unrelated section of the LMRA addressing "unlawful concerted activities." H.R. Min. Rep. No. 80-245, at 95 (1947), 1 LEG.HIST. at 386; *see* Rep. No. 80-510, at 58-59 (1947), *reprinted in* 1 LEG.HIST. at 562-63 (emphasis added); 93 Cong. Rec. 6378 (1947) (conference report). The proposed section that the report discussed was not included in the LMRA. *Id.* This Court has previously pointed to the failure to enact that provision, which would have expanded liability for specified labor-related activities, as support for *limiting* the scope of Section 301 liability, even though an employer may be left effectively remediless in certain situations. *See Complete Auto Transit*, 451 U.S. at 414-17.[22]

---

[22] The one passing reference to "Section 301" contained in the portion of the Minority Report cited by Granite Rock was actually a reference to an antitrust-related provision that was also later deleted. H.R. Min. Rep. No. 80-245, at 95 (1947), *reprinted in* 1 LEG.HIST. at 386; Rep. No. 80-510, at 65 (1947), *reprinted in* 1 LEG.HIST. at 569; 93 Cong. Rec. 6380 (1947) (conference report).

C. While The Court Has Authority Pursuant To Section 301 To Fashion A Federal Common Law Of Contract Enforcement, It Should Reject Petitioner's Invitation To Re-Write That Section To Include Tort Claims Against Non-Parties That Have No Contractual Obligations.

1. In *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), the Court was presented with the question of whether, pursuant to Section 301, federal courts can order specific performance of a CBA's arbitration provision. Prior to *Lincoln Mills*, some courts concluded that Section 301 did not grant such authority. *See* 353 U.S. at 450-51. The Court, however, held to the contrary because it found that in order to effectuate the purpose of Section 301—holding the parties to their collective bargaining agreements—federal courts were empowered to fashion a federal common law for the enforcement of such contracts based on "the policy of our national labor laws." *Id.* at 454-56.

Petitioner asks the Court, in the guise of fashioning a federal common law of *contract enforcement*, to interpret Section 301 to permit tort claims against non-parties that have no duties that are created by the CBA at issue—*i.e.*, no contract obligations *that can be enforced against them*. But the Court has warned that:

> *Lincoln Mills* did not envision any freewheeling inquiry into what the federal courts might find to be the most desirable rule, irrespective of congressional pronouncements. Rather, it is clear that in fashioning federal law under § 301(a)

> substantial deference should be paid to revealed congressional intention.

Complete Auto Transit, 451 U.S. at 406 (quotation marks and citation omitted). As the Seventh Circuit has cogently explained:

> [W]hile there is much talk in the cases of judicial responsibility to create a federal common law of *collective bargaining agreements* under Section 301, the qualification that we have italicized is crucial. The common law to be made is a law of contracts, not a source of independent rights, let alone tort rights; for section 301 is . . . a grant of jurisdiction **only to enforce contracts**.

Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176, 1180 (7th Cir. 1993) (Posner, J.) (citation omitted) (italics in original; bold added).

The Court has had occasion to invoke the authority of *Lincoln Mills* in cases regarding claims by individuals who, while not direct parties to the contract, nevertheless had important rights that were created by it. Its holdings under Section 301 have been limited to permitting the enforcement of such third-party beneficiary rights. *See, e.g., Smith v. Evening News Ass'n*, 371 U.S. 195, 200 (1962) (employees may sue employer to enforce their contractual rights under collective bargaining agreement); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) (same).[23] Thus, the Court has remained true to the

---

[23] Contrary to Petitioner's and its *amicus*'s intimation (Pet'r Br. at 48-49, 54-55), *Hechler*, 481 U.S. 851, *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), and *Atkinson*, 370 U.S. 238, did not recognize a tort claim under Section 301. Rather, they held that the employees' tort claims were *preempted* by Section 301. 481 U.S. at 860-62; 471 U.S. at 210-11; 370 U.S. at 245-49.

"revealed congressional intention" (*Complete Auto Transit*) of Section 301 that suits for the enforcement of contractual rights and duties can be brought in federal court under Section 301; and nine circuits (including the Ninth Circuit in this case) have correctly refused to construe *Lincoln Mills* as authorization to extend Section 301 beyond the enforcement of labor agreements by parties and third-party beneficiaries, to include claims for tortious interference against non-parties that have no duties under the agreement. *See* n.15, *supra*.[24]

Although *Hechler* held that a union member can bring a Section 301 breach of contract claim against her union *if* the union voluntarily assumed contractual duties toward members (481 U.S. at 861-62), the Court has since cautioned that a member "must be able to point to language in the collective-bargaining agreement specifically indicating an intent to create obligations enforceable against the union by the individual employees." *United Steelworkers v. Rawson*, 495 U.S. 362, 374-75 (1990) (plaintiffs in Section 301 suit against union cannot use tort law to supplement the duties arising out of the contract). And although the Court in *Textron* noted that an allegation of tortious inducement could be raised in a Section 301 suit, it found that is proper only as an affirmative defense to an *action to enforce a contract*. 523 U.S. at 658.

[24] Contrary to Petitioner's assertion, the International is not claiming "immunity" because of "its third party non-signatory status." Pet'r at 58. Rather, Petitioner cannot bring a claim against the International under Section 301 because the International has no duties under the CBA. Circuit courts, including the Ninth Circuit, have held that Section 301 authorizes claims against non-parties who do have contractual obligations, *i.e.*, third-party obligors. *See, e.g., Painting & Decorating Contractors Assoc. of Sacramento, Inc. v. Painters & Decorators Jt. Comm. of the East Bay Counties*, 707 F.2d 1067 (9th Cir. 1983) (joint labor-management committee created by the contract to administer its provisions is a proper defendant where it is indispensable to the appropriate remedy); *Whelan v. Colgan*,

2. Limiting Section 301 to claims for the enforcement of contractual obligations accords deference to the role of Congress in fashioning norms of federal labor policy. A breach of contract claim pursuant to Section 301 simply enforces rights and obligations privately created and defined by the mutual assent of employers and unions that have engaged in the process of collective bargaining mandated by federal labor statutes. *See* 29 U.S.C. §§ 158(a)(5), (b)(3), (d).[25] In practice, Section 301 suits almost always involve the enforcement of contractual rights and obligations through the arbitration provision of the CBA. The reason is that a CBA typically defines an arbitrable "grievance," as the Granite Rock-Local 287 contract does, to be a "dispute[ ] arising under [the] agreement," and provides that all such disputes must be "resolved in accordance with the [grievance] procedure," which terminates in final and binding arbitration. JA 434; *see* Elkouri & Elkouri, HOW ARBITRATION WORKS 128-30 (Alan Miles Ruben ed., 6th ed. 2003). As the Court has noted, the "undertaking by the employer to submit grievances to the process of arbitration" is the "quid pro quo" for the union's "no strike obligation." *Boys Market, Inc. v. Retail Clerks Union No. 770*, 398 U.S. 235, 248 (1970). "Arbitrators are delegated by nearly all collective-bargaining agreements as the adjudicators

---

602 F.2d 1060 (2d Cir. 1979) (trustees of trust created by collective bargaining agreement are proper defendants).

[25] *See, generally*, 1 Richard A. Lord, WILLISTON ON CONTRACTS § 1:1, p. 8 (4th ed. 2007) ("The goal of contract law is to hold parties to their agreements so that they receive the benefits of their bargain."); RESTATEMENT (SECOND) OF CONTRACTS 1 (1981) (volume one introduction) ("The Restatement of this Subject deals in general with the legal relations arising from promises and the remedies available when a promise if broken.").

of contract disputes." *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 411 n.11 (1988) (citing report that arbitration is required in ninety-nine percent of sample contracts). The Court has read Section 301

> to authorize the development of federal common-law rules of decision, in large part to assure that agreements to arbitrate grievances would be enforced, regardless of the vagaries of state law and lingering hostility toward extrajudicial dispute resolution, *see* [*Lincoln Mills*, 353 U.S. at 455-456]; *see also* [*Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *Avco Corp. v. Machinists*, 390 U.S. 557, 559 (1968)] ("§ 301 . . . was fashioned by Congress to place sanctions behind agreements to arbitrate grievance disputes.").

Livadas v. Bradshaw, 512 U.S. 107, 122 (1994).

The enforcement of grievance/arbitration provisions voluntarily agreed to by the parties to a CBA does not involve the courts in establishing norms in critical areas of federal labor policy such as the recognition of unions, the scope of bargaining units, mandatory subjects of bargaining, the duty to bargain in good faith, or the economic weapons that labor and management can employ. In contrast, the type of tort claim Granite Rock urges the Court to sanction raises precisely that danger. Like all torts, liability for tortious interference is not premised on a contractual duty, but instead is based on "[a] violation of *a duty imposed by general law or otherwise upon all persons* . . . ." BLACK'S LAW DICTIONARY 1036 (abridged 6th ed. 1991) (emphasis added). Granite Rock acknowledges that its claim against the International "derive[s] from a general rather than contractual duty." Ninth Cir. Opening Br. at 33. Torts involve

issues of public policy. *See* RESTATEMENT (SECOND) OF TORTS § 1, p. 3 (1965) (cmt. d). In order for a parent union or parent employer to be held liable for tortious interference, a court (or jury) must determine that its "interference [was] improper." *Id.* § 766 cmt. c. In making that determination, the trier of fact must weigh "[t]he plaintiff's interest in his contractual rights . . . against the defendant's interest in freedom of action . . . . The issue is whether in the given circumstances [defendant's] interest and the social interest in allowing the freedom claimed by [defendant] are sufficient to outweigh the harm that his conduct is designed to produce." *Id.*; *id.* § 767; *see Amicus* Associated General Contractors Br. at 38 (to determine if a non-signatory's conduct is "improper," a court should consider "the social interests in protecting the freedom of action of the non-signatory and the contractual interests of the parties").

Congress, however, has determined that the balancing process involved in determining important substantive issues of labor law should not be made by courts through the application of common law principles, but rather should be made by Congress when it legislates specialized statutes dealing with labor-management relations. Indeed, Congress enacted the Norris-LaGuardia Act (29 U.S.C. §§ 101 *et seq.*), the NLRA, and other labor statutes in response to the manner in which labor relations issues had been dealt with by courts. *See BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 543 (2002) (in passing early labor statutes "Congress hoped to substitut[e] the opinion of Congress as to the propriety of the purpose [of union activities] for that of differing judges"; "Similar objectives informed Congress' later enactment of the NLRA, which took from the courts much of the power to regulate the relations between

employers of labor and workingmen by granting authority to an administrative agency." (quotation marks and citations omitted)); *United States v. Hutcheson*, 312 U.S. 219, 229-31 (1941) (describing series of statutes enacted to narrow role of federal courts in labor relations); 1 THE DEVELOPING LABOR LAW 4 (John E. Higgins, Jr., ed., 5th ed. 2006) (describing "[t]he inability of the courts to provide viable solutions to the problems presented by the labor movement"); *United Mine Workers v. Pennington*, 381 U.S. 676, 709 (1965) (Goldberg, J., dissenting from opinion but concurring in judgment) ("[H]istory shows a consistent congressional purpose to limit severely judicial intervention in collective bargaining . . . and, rather, to deal with what Congress deemed to be specific abuses on the part of labor unions by specific proscriptions in the labor statutes").

The day-to-day enforcement of the labor laws enacted by Congress has been entrusted primarily to the National Labor Relations Board, the agency with relevant expertise. *See, e.g., NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963):

> [W]e must recognize the Board's special function of applying the general provisions of the Act to the complexities of industrial life . . . and of (appraising) carefully the interests of both sides to any labor management controversy in the diverse circumstances of particular cases from its special understanding of the actualities of industrial relations. The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress

> committed primarily to the National Labor Relations Board, subject to limited judicial review.

Accord NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 498 (1960); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 242 (1959).

As discussed *supra*, Congress did create in Section 301 a narrow jurisdiction for federal courts to decide "[s]uits for violation of contracts," primarily to enforce grievance and arbitration procedures collectively bargained by unions and employers in accordance with labor laws enacted by Congress. But since the passage of federal laws governing labor-management relations, federal courts have *not* engaged in fashioning a common law of labor torts to regulate the conduct of unions and employers. As the Restatement of Torts (Second) explained, it omitted entirely the chapter that previously had been devoted to labor disputes because:

> Obviously, the law of labor disputes and their effect in interfering with contractual relations has ceased to be regarded as part of Tort Law and has become an integral part of the general subject of Labor Law, with all of its statutory and administrative regulations, both state and federal.

RESTATEMENT (SECOND) OF TORTS Div. 9 Introductory Note (1977); *see also* PROSSER & KEETON §130 at 1027 ("[T]he general preemption of the field by the federal government . . . ha[s] substantially eliminated the traditional role of tort law in dealing with the economic results of the labor activity.").

As noted earlier, while Congress did create tort-like remedies in the LMRA to deal with certain types of interference by unions with an employer's business

relations, it specifically rejected creating an unfair labor practice that would have dealt with the very conduct that Granite Rock wishes to litigate in federal court. *See supra* at Section II.B.2. As we discuss next, permitting tort claims under Section 301 would require federal courts to resolve a wide variety of issues in creating a federal common law of tortious interference with contract that would involve them in making precisely the type of policy decisions regarding labor law that Congress has entrusted to itself and the National Labor Relations Board. As Justice Stevens correctly recognized in his concurrence in *Textron*:

> The rules governing disputes that arise out of the collective-bargaining process are within the special competence of the National Labor Relations Board. The fact that the Board undoubtedly has more expertise in the collective-bargaining area than federal judges provides an additional reason for concluding that Congress meant what it said in § 301(a) and for rejecting [a] broad reading of the "[s]uits for violation of contracts" language.

Textron, 523 U.S. at 662 (Stevens, J., concurring) (citation omitted).

D. Permitting Tort Claims Under Section 301 Would Require Courts To Create A Common Law Of Tort That Would Allow Parties To Evade Their Agreement To Arbitrate Disputes Over The Meaning And Application Of A Collective Bargaining Agreement, And That Could Extend Liability Not Only To Parent Unions, But To Parent Corporations, Customers Of Employers, And A Wide Range Of Other Strangers To The Collective Bargaining Agreement.

1. Petitioner offers the ominous prediction that nothing less than wholesale "industrial chaos" will result if the Court affirms the ruling by the Ninth Circuit that tortious interference claims are not cognizable under Section 301. This hyperbole is baseless. At least as early as 1954, courts held that Congress did not intend to provide a cause of action for tortious interference claims against third parties. *See, e.g., Square D Co. v. United Elec. Workers*, 123 F.Supp. 776 (E.D. Mich. 1954) (dismissing claim that international union induced strike in violation of local's collective bargaining agreement). During the next half-century, circuit after circuit reached the same conclusion that is now effectively the law in at least 40 states, and has been the law in most of them for many years. *See* n.15, *supra*. If the holdings by those courts would truly lead to industrial chaos, it surely would have been apparent long before the Ninth Circuit followed their lead.[26]

---

[26] Indeed, in 1946, there were 4,985 strikes. H.R. Rep. No. 80-245 at 4, *reprinted in* 1 LEG.HIST. at 295. In the five years between 2004 and 2008, the average number of work stoppages

The task of creating a federal common law of tortious interference will be extremely complex and burdensome. Prosser and Keeton describe the existing state law of tortious interference with contract as "leaving a rather broad and undefined tort in which no specific conduct is proscribed and in which liability turns on the purpose for which the defendant acts, with the indistinct notion that the purposes must be considered improper in some undefined way." PROSSER AND KEETON ON THE LAW OF TORTS § 129, at 979 (5th ed. 1984). Federal courts would have to immerse themselves in this amorphous field of law that is far-removed from breach of contract litigation with which they are familiar. While many of the issues that might arise cannot be anticipated, numerous other issues are readily apparent from the many conflicts that currently exist under common law of the various states. Such differences include the scope of the claim,[27] the statute of limitations,[28]

---

that began during each year was only 232.4 (without adjusting for population growth). Federal Mediation & Conciliation Service, 2008 ANNUAL REPORT 7 (2008), *available at* http://fmcs.gov/assets/files/annual%20reports/FY2008_Annual_Report.pdf (last visited Oct. 22, 2009). Thus, it can hardly be said that the absence of a claim for tortious interference has "brought our country to the brink of economic paralysis." Pet'r Br. at 39 (quotation marks and citation omitted).

[27] Louisiana, for example, only recognizes tortious interference with contract in very limited instances of claims against corporate officers. *See 9 to 5 Fashions, Inc. v. Spurney*, 538 So.2d 228, 234 (La. 1989).

[28] Two years: *CGB Occupational Therapy, Inc. v. RHA Health*, 357 F.3d 375, 383 (3rd Cir. 2004) (Pennsylvania law); *Burke v. Insurance Auto Auctions Corp.*, 169 S.W.3d 771, 776 (Tex. App. 2005). Three years: *Pure Distribs., Inc. v. Baker*, 285 F.3d 150, 154-55 (1st Cir. 2002) (Massachusetts law); *Quality Optical of Jonesboro, Inc. v. Trusty Optical, LLC*, 225 S.W.3d 369, 372

whether the interference must be intentional or merely knowing,[29] what constitutes "improper" interference,[30] whether and to what degree motive matters,[31] whether plaintiff must establish improper conduct (*i.e.*, without justification) or whether justification is an affirmative defense,[32] and how to define

---

(Ark. 2006). Four years: *Hroch v. Farmland Indus., Inc.*, 548 N.W.2d 367, 371 (Neb. Ct. App. 1996). Six years: *Fraser v. Bovino*, 721 A.2d 20, 25 (N.J. Super. Ct. App. Div. 1998).

[29] *Compare McLinden v. Coco*, 765 N.E.2d 606, 617 (Ind. Ct. App. 2002), *and J.J. Indus., LLC v. Bennett*, 71 P.3d 1264, 1268 (Nev. 2003), *with DiGiorgio Cop. v. Mendez & Co., Inc.*, 230 F. Supp. 2d 552, 564 (D.N.J. 2002), *and Neider v. Franklin*, 844 So.2d 433, 437 (Miss. 2003), *and Quelimane Co. v. Stewart Title Guar. Co.*, 960 P.2d 513, 19 Cal. 4th 26, 56 (1998).

[30] *See* Dan B. Dobbs, THE LAW OF TORTS § 446, at 1263 (2001) ("In neither the interference with contract nor interference with opportunity torts have courts been able to provide any concept of what counts as wrongful or improper. Many decisions are so vague about what is 'wrong' that the judicial process itself is sometimes dubious in these cases.").

[31] *Compare Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 211 (Tex. 1996), *and Harman v. Heartland Food Co.*, 614 N.W.2d 236, 242 (Minn. Ct. App. 2000), *with United Truck Leasing Corp. v. Geltman*, 551 N.E.2d 20, 22-24 (Mass. 1990), *with Harrison v. NetCentric Corp.*, 744 N.E.2d 622 ,632 (Mass. 2001); *Alyeska Pipeline Serv. Co. v. Aurora Air Serv., Inc.*, 604 P.2d 1090, 1094 (Ala. 1979), *and with Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass'n*, 670 N.W.2d 569, 580 (Mich. Ct. App. 2003).

[32] *Compare United Truck Leasing Corp.*, 551 N.E.2d at 23-24, *and Mason v. Wal-Mart Stores, Inc.*, 969 S.W.2d 160, 164-65 (Ark. 1998), *and Sheaffer v. State ex rel. Univ. of Wyo.*, 202 P.3d 1030, 1044 (Wyo. 2009), *with Texas Beef Cattle*, 921 S.W.2d at 210, *and Roy v. Coyne*, 630 N.E.2d 1024, 1030-31 (Ill. App. Ct. 1994), *and Parsons v. Aaron*, 849 So.2d 932, 946 (Ala. 2002).

malice and justification.[33] There is no uniform state common law view on these issues.

As Justice Scalia has noted in a different context, if the Court were to announce a "new, immediately applicable, federal common law of torts" where existing state laws vary significantly, "the parties and lower federal judges confronted by the new 'common law' [would] have barely a clue as to what its content might be." *Jaffee v. Redmond*, 518 U.S. 1, 27 (1996) (Scalia, J., dissenting). Such will be the case if the Court overturns a half-century of nearly unanimous circuit law and recognizes tortious interference claims under Section 301; and in creating a uniform common law of tortious interference, federal courts will be required to establish substantive norms regarding labor-management relations, contrary to the wish of Congress.

2. Aside from the new and complicated issues that federal district courts would be required to decide, "federalizing" tortious interference claims under Section 301 would also increase the courts' dockets. For example, an employee who had been terminated could decide not to proceed with a grievance under the CBA against his employer, but instead to file a

---

[33] Varying definitions of malice: *Compare Scruggs, Millette, Bozeman & Dent, P.A. v. Merkel*, 910 So. 2d 1093, 1100 (Miss. 2005), *and Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1235-36 (Ind. 1994), *with DiGiorgio Corp.*, 230 F. Supp. 2d at 559, *and St. Mary's Hosp. of Athens, Inc. v. Radiology Prof. Corp.*, 421 S.E.2d 731, 124 (Ga. Ct. App. 1992). Varying definitions of justification: *Compare Ocean State Phys. Health Plan, Inc. v. Blue Cross & Shield of Rhode Island*, 883 F.2d 1101, 1113 (1st Cir. 1989), *and Area Landscaping, LLC v. Glaxo-Wellcome, Inc.*, 586 S.E.2d 507, 510 (N.C. Ct. App. 2003), *with White Plains Coat & Apron Co., Inc. v. Cintas Corp.*, 8 N.Y.3d 422, 425 (N.Y. 2007), *and Chaves v. Johnson*, 230 Va.112, 121 (Va. 1985).

tortious interference suit in federal court against his employer's parent entity, claiming that it was actually responsible for his termination in violation of the CBA's "just cause" provision.[34] Aside from the tortious interference issues listed above, the district court would also have to decide whether there was a breach of the CBA, since it would be an element of the tortious interference claim. The court (or a jury) would have to decide whether the termination was for just cause. Thus, federal judges or juries would be dragged into deciding run-of-the-mill discharge litigation issues that normally are resolved by arbitrators, but could not be in the tortious interference context because the parent company would not be a party to the CBA and therefore could not invoke arbitration under that agreement.

In fact, even if the employee did file a grievance against his employer, in addition to bringing a tortious interference claim against the employer's parent, the issue of whether the termination was for just cause might still have to be decided in district court. If the grievance were resolved in the employee's favor by an arbitrator pursuant to the CBA, the parent (assuming it did not have an agency or alter-ego relationship with its subsidiary) would not be bound by the arbitrator's decision and therefore could litigate the propriety of the discharge anew in district court.

---

[34] At common law, a party whose contract has been breached need not pursue its breach of contract claim against the other party to the agreement in order to pursue a tortious interference claim against a non-party. *See* 2 Dobbs, THE LAW OF TORTS § 445, p. 1258 (2001); *see also* THE RESTATEMENT (SECOND) OF TORTS § 774A(2) (plaintiff can seek full recovery from tortfeasor).

Employees who are terminated would always have an incentive to file a tortious interference action in federal court against a parent company, supervisor, customer or some other non-party whom they claimed was responsible for their discharge. First, the employees could bypass the CBA's grievance/arbitration procedure controlled by the union, which can refuse to take the employee's termination grievance to arbitration as long as it does not violate its duty of fair representation by acting in an arbitrary, discriminatory or bad faith manner. *See Vaca v. Sipes*, 386 U.S. 171, 190-92 (1967). Second, at arbitration employees generally can only recover lost wages and benefits (Elkouri & Elkouri, *supra*, at 1205), while in a tort action they can also seek to recover consequential and punitive damages. Third, by suing the parent entity, employees can pursue a "deep pocket." These last two considerations will also lead employers (as in this case) to bring tortious interference cases against international unions.

Finally, having the same claim litigated in two different fora will present complicated procedural issues and result in duplicative litigation of various issues. Assume in this case that the Court were to hold that Section 301 permits Granite Rock's tortious interference claim against the International to proceed in federal court, and that an arbitrator should decide in Granite Rock's claim against Local 287 whether the CBA was ratified on July 2, 2004 and, if so, whether there was a breach of the CBA and, if so, what damages if any Granite Rock suffered as a result of the breach. Should the tort action against the International proceed before the arbitrator rules? Or should the tort action be stayed until the arbitrator decides whether there was a contract in effect at the time of the strike and

whether there was a breach of contract by Local 287? If the arbitrator were to hold in the affirmative on both of those issues, the International would have a right to re-litigate them in court, since it is not an agent or alter-ego of Local 287 and has not had its day in court as to those issues. If the arbitrator were to determine that the damages sustained by Granite Rock were $50,000, the International would also have a right to re-litigate that issue in district court, and $50,000 would be the ceiling for damages that could be awarded to Granite Rock against the International.

3. Expanding Section 301 jurisdiction to include claims for tortious interference will also subject a wide range of non-party defendants to suits by employees, unions, employers, and others. A review of cases in which Section 301 has been held to preempt state law tortious interference claims, or where courts have rejected tortious interference claims brought directly under Section 301, reveals the wide variety of such claims and of the possible plaintiffs and defendants. They include tortious interference claims by employees against supervisors;[35] by employees against their employer's contractors;[36] by employees against labor consultants hired by employers;[37] by employees and unions against

---

[35] *See, e.g., Magerer v. John Sexton & Co.*, 912 F.2d 525 (1st Cir. 1990); *Steinbach v. Dillon Cos.*, 253 F.3d 538 (10th Cir. 2001); *Turner v. Federation of Teachers Local 1565*, 138 F.3d 878 (11th Cir. 1998).

[36] *See, e.g. Serv., Hosp., Nursing Home & Pub. Employees Union, Local No. 47*, 755 F.2d 499 (6th Cir.); *cf. Baylis v. Marriot Corp.*, 906 F.2d 874 (2d Cir. 1990) (Railway Labor Act preemption).

[37] *See, e.g., Loss v. Blankenship*, 673 F.2d 942 (7th Cir.).

their employers' parent or controlling companies, or their owners individually;[38] by employees against unions;[39] by employees and unions against employers' clients or customers, and employees of customers;[40] by employees against co-workers;[41] by employees against trustees and attorneys;[42] by unions against trade organizations;[43] and by unions against employers' creditors.[44] In short, the wide variety of tortious interference claims that have been brought in both federal and state courts against a broad array of third-party defendants, and that have been dismissed since the enactment of Section 301 either on the basis of lack of jurisdiction under that section or preemption pursuant to that section, will find a new home in federal court. A tortious interference claim will become the weapon of choice for employers, unions and employees who wish to expand a contract dispute and seek punitive damages against a "deep pocket" defendant.

---

[38] *See, e.g., Covenant Coal*, 977 F.2d 895 (4th Cir.); *Milne Employees Ass'n*, 960 F.2d 1401 (9th Cir.).

[39] *See, e.g., Beidleman v. The Stroh Brewery Co.*, 182 F.3d 225 (3d Cir. 1999).

[40] *See, e.g., Kimbro v. Pepsico, Inc.*, 215 F.3d 723 (7th Cir. 2000); *cf. Dougherty v. Parsec, Inc.*, 872 F.2d 766 (6th Cir. 1989).

[41] *See, e.g., Decoe v. General Motors, Corp.*, 32 F.3d 212 (6th Cir. 1994); *Johnson v. Anheuser Busch, Inc.*, 876 F.2d 620 (8th Cir. 1989).

[42] *Cf. Bowers*, 393 F.2d 421 (1st Cir.).

[43] *See, e.g., Carpenters Local Union No. 1846*, 690 F.2d 489 (5th Cir.).

[44] *See, e.g., Quality Plus Stores, Inc.*, 961 F.2d 904 (10th Cir.).

E. There Is No Basis For Petitioner's Suggestion That The Court Should Disrupt The Rights And Remedies Congress Created Under Section 301.

Paraphrasing *Marbury v. Madison*, Petitioner invokes the maxim "for every wrong, there is a remedy." Pet'r Br. at 54. This principle, Petitioner suggests, should lead the Court to abrogate over fifty years of near-unanimous lower court rulings, and hold that tort claims can be brought in federal court under Section 301. Granite Rock's contention ignores two critical points.

First, Congress *did* provide Petitioner with remedies for the alleged breach of contract by Local 287. Granite Rock had a contractual remedy against Local 287 pursuant to the CBA's grievance and arbitration procedure and, as the Court held in *Lincoln Mills*, Granite Rock could enforce that procedure through Section 301. Through arbitration, Granite Rock could recover all damages caused by any breach of the CBA by Local 287. Additionally, in 29 U.S.C. § 158(b)(3), Congress provided Granite Rock with an unfair labor practice charge that it pursued against Local 287 before the NLRB. *See supra* n.1; *see also Associated Gen. Contractors of Minn.*, 290 NLRB 522, 534 (1988) (strikes undertaken in violation of a no-strike provision and intended to force an employer to agree to new contractual provisions may constitute an unfair labor practice under 29 U.S.C. § 158(b)(3)).

The second flaw with Petitioner's *Marbury v. Madison* argument is that the actual words used by Chief Justice Marshall were: "'*where there is a legal right*, there is also a legal remedy.'" 5 U.S. 137, 163 (1803) (quoting Blackstone) (emphasis added). If Congress in Section 301 did not provide a tort right against

non-parties that have no obligations under a CBA, the principle of *Marbury* is not applicable.

As discussed *supra*, Congress has regulated the field of labor-management relations through the NLRA, as amended by the LMRA, and has created certain exclusive federal rights and remedies that are not coextensive with the analogous rights and remedies provided under state law. Congress has also preempted many state law rights and remedies.[45] Congress has thereby crafted a balance of rights and remedies that in its judgment best promotes national labor policy; protected those rights from interference by the states; and divided the enforcement of those federal rights and remedies between the NLRB and the federal courts. The Court has repeatedly cautioned against upsetting this congressional balance. *See, e.g., Lodge 76, Int'l Ass'n of Machinists v. Wisc. Employment Relations Comm'n*, 427 U.S. 132, 155 (1976) (certain areas must be "free of regulation" if "congressional intent in enacting the comprehensive federal law of labor relations is not to be frustrated"); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 239, 244 (1959) ("comprehensive regulation of industrial relations by Congress" requires preemption where states seek to "control conduct which is the subject of national regulation [because permitting state regulation] would create potential frustration of national purposes"); *South Prairie Constr. Co. v. Local*

---

[45] For example, prior to congressional regulation of labor relations, some states permitted unions to engage in "secondary boycotts" against employers with which they had disputes. *See, e.g., Imperial Ice Co.*, 18 Cal.2d at 35; *Pierce*, 156 Cal. at 76-77. As noted above, in the LMRA Congress generally prohibited this weapon that unions had previously enjoyed. *See* 29 U.S.C. §§ 158(b)(4)(B), 187.

No. 627, Int'l Union of Operating Eng'rs, 425 U.S. 800 (1976) (courts should not decide representation issues that come within the NLRB's primary jurisdiction). In some circumstances, employers, unions or employees are left *completely* remediless, because that is part of the careful balance that Congress struck.[46] The pre-emptive effect is similar to that which exists in other areas of law, where Congress also decided to regulate a field and preempt state law causes of action, while it circumscribed the rights and remedies available under federal statutes. *See, e.g., Riegel v. Medtronic, Inc.*, 552 U.S. 312, 128 S.Ct. 999 (2008) (Food, Drug, and Cosmetic Act); *Aetna Health Inc.v. Davila*, 542 U.S. 200, 222 (2004) (Ginsburg, J., concurring) (ERISA creates a "host of situations in which persons adversely affected by ERISA-proscribed wrongdoing cannot gain make-whole relief"); *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) (Airlines Deregulation Act); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993) (Federal Railroad Safety Act).

Such decisions are for Congress to make, and they should be left to that branch of government to revisit if it wishes, as it did when it amended the NLRA by enacting the LMRA. *Cf. Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985); *Riegel*, 552 U.S. 312, 128 S.Ct. at 1009 ("It is not our job to speculate

---

[46] *See, e.g., Complete Auto Transit*, 451 U.S. at 407-08 (Section 301(b) shields individual employees from liability for their breach of the no-strike clause and holds the union liable only if it participates in or authorizes the strike; "Congress intended this result even though it might leave the employer unable to recover for his losses"); *Rawson*, 495 U.S. at 371-75 (union members' state-law tort claim against union preempted by Section 301, and no Section 301 contract claim exists because nothing in agreement created any relevant right that could be enforced by members).

upon congressional motives."). As the Ninth Circuit properly held: "If Congress did not provide a remedy for Granite Rock directly against [the International] on its asserted tortious interference claim, then that is an issue to be addressed by Congress, not by an extraordinary and outlier interpretation of the governing statute." JA 54-55.

CONCLUSION

For all of the above reasons, the Court should affirm the decision of the Ninth Circuit with regard to Granite Rock's claim against the International.

Respectfully submitted,

STEPHEN P. BERZON
PETER D. NUSSBAUM *
PEDER J. V. THOREEN
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

Counsel for Respondent International Brotherhood of Teamsters

* Counsel of Record

October 26, 2009

RESPONDENT'S BRIEF

(13)

No. 08-1214

SUPREME COURT, U.S.
FILED
OCT 26 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GRANITE ROCK COMPANY,
Petitioner,

v.

THE INTERNATIONAL BROTHERHOOD TEAMSTERS & TEAMSTERS LOCAL 287,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT TEAMSTERS LOCAL 287

Of Counsel

DAVID ROSENFELD
WEINBERG, ROGER & ROSENFELD
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501
(510) 337-1001

DUANE B. BEESON
Counsel of Record for Teamsters Local 287
ROBERT BONSALL
HOLLY K. HERNDON
BEESON, TAYER & BODINE
1404 Franklin St., 5th Floor
Oakland, CA 94612
(510) 625-9700

Counsel for Respondents

October 26, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

Petitioner's breach of contract claim against the Union now before the Court presents two questions:

1. Whether by filing the lawsuit to enforce the no-strike provision in the tentative agreement reached at the bargaining table, Petitioner subjected itself to a contractual obligation to arbitrate the parties' dispute as to whether the agreement had been ratified.

2. Whether, in any event, the District Court erred in denying the Union's motion to compel arbitration of that dispute at a time when the tentative agreement had concededly been ratified and was in full force and effect.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	10
ARGUMENT	12
I. INTRODUCTION: THE SOURCE OF THE GOVERNING LAW	12
II. GRANITE ROCK WAS SUBJECT TO A CONTRACTUAL OBLIGATION TO ARBITRATE THE DISPUTE WITH LOCAL 287	15
III. THE DISTRICT COURT ERRED IN FAILING TO COMPEL ARBITRATION AT A TIME THE AGREEMENT WAS CONCEDEDLY IN FULL FORCE AND EFFECT	26
A. The Tentative Agreement was in Existence when Local 287 Filed its Motion to Compel	26
B. The Presumption of Arbitrability Overcomes Petitioner's Defenses	28
CONCLUSION	31

TABLE OF AUTHORITIES

CASES Page

14 Penn Plaza v. Pyett, 556 U.S. ___ (2009).. 14
AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643 (1986)..... 15, 24
Avila Group v. Norma J of California, 426 F.Supp. 537 (S.D.N.Y. 1977) 16
Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006).....*passim*
Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001)..... 14
Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S., 9 F.3d 1060 (2nd Cir. 1993)..... 15
Drake Bakeries, Inc. v. Local 50, Am. Bakery & Confectionery Workers, 370 U.S. 254 (1962).....*passim*
First Options v. Kaplan, 514 U.S. 938 (1995).....14, 15, 21, 30
Gateway Coal Co. v. United Mine Workers of America, 414 U.S. 368 (1974)..... 15, 30
George Day Construction Co. v. Carpenters Local 354, 622 F.2d 1471 (9th Cir. 1984)..... 30
Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003)..... 14
Grigson v. Creative Artists Agency, 210 F.3d 524 (2000) 17
Hall Street Associates v. Mattel, Inc., 552 U.S. 576 (2008)..... 13
Howsam v. Dean Witter Reynolds, 537 U.S. 79 (2002)..... 14

TABLE OF AUTHORITIES—Continued

Page

Hughes Masonry v. Greater Clark County School Bldg. Corp., 659 F.2d 836 (8th Cir. 1981) 17, 18

International Paper Company v. Schwabedissen Maschinen & Anlagen, 206 F.3d 411 (4th Cir. 2000) 17

John Wiley & Sons, Inc. v. David Livingston, 376 U.S. 543 (1964) 15

Local Union No. 721, United Packinghouse, Food and Allied Workers v. Needham Packing Co., 376 U.S. 247 (1964) 28

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 (1985) 14

Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, 460 U.S. 1 (1983) 12-13, 14

MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942 (11th Cir. 1999) 17

Nagrampa v. Mailcoups, Inc., 469 F.3d. 1257 (9th Cir. 2006) 6

Preston v. Ferrer, 552 U.S. 346 (2008) 24

Prima Paint Corporation v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) ..... *passim*

Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965) 18, 27

Sandvik AB v. Advent Int'l. Corp., 220 F.3d 99 (3rd Cir. 2000) 22

Sourcing Unlimited, Inc. v. Asimco International, Inc., 526 F.3d 38 (1st Cir. 2008) 17

Sunkist Soft Drinks v. Sunkist Growers, 10 F.3d 753 (11th Cir. 1993) 16

TABLE OF AUTHORITIES—Continued

	Page
Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962)	27
Teamsters Local 287 (Granite Rock Company), 347 N.L.R.B. 339 (2006)	9
Teamsters Local 287 v. N.L.R.B., 293 Fed.App. 518 (9th Cir. 2008)	9
Tepper Realty Co. v. Mosaic Tile Co., 259 F.Supp. 688 (S.D.N.Y. 1966)	18
Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448 (1957)	13
United Paperworkers v. Misco, 484 U.S. 29 (1987)	13
United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960)	8, 12, 15, 29
Vaca v. Sipes, 386 U.S. 171 (1967)	17
Vaden v. Discover Bank, 556 U.S. (2009)	13

STATUTES

Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*	*passim*
Federal Rules of Civil Procedure Rule 12	5
Federal Rules of Civil Procedure Rule 50	7
Federal Rules of Civil Procedure Rule 59	5, 7
Federal Rules of Civil Procedure Rule 65	5
Labor Management Relations Act Section 301 29 U.S.C. § 185	*passim*
Labor Management Relations Act, 29 U.S.C. § 173	15
National Labor Relations Act Section 8(b)(3)	9

IN THE

Supreme Court of the United States

No. 08-1214

GRANITE ROCK COMPANY,
Petitioner,

v.

THE INTERNATIONAL BROTHERHOOD TEAMSTERS & TEAMSTERS LOCAL 287,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT TEAMSTERS LOCAL 287

OPINION BELOW

The opinion of the Ninth Circuit in this case appears at 546 F.3d 1169 (9th Cir. 2008). The orders of the District Court dealing with the Union's motions to compel arbitration are unreported, but are included in the Joint Appendix at pp. 226-33, 234-48, and 343-62.

JURISDICTION

Respondent Local 287 accepts the jurisdiction statement appearing at p. 1 in Petitioner's Brief.

STATUTORY PROVISIONS

Section 301(a) of the Labor Management Relations Action, 29 U.S.C. § 185(a), provides as follows:

> Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

A. Summary of the Underlying Facts

Petitioner Granite Rock ("Granite Rock") is a supplier of construction materials, including ready mix concrete, aggregate and asphalt, among other products. (JA 71, 119.) It has several facilities in Northern California and collective bargaining relationships with a number of unions. The facility principally involved in this case is a ready-mix plant in San Jose, California where Respondent Teamsters Local 287 ("Union" or "Local 287") represents approximately twenty ready-mix drivers. (JA 71, 119-20.)

On June 9, 2004, following the expiration of their most recent agreement, Local 287 struck in support of its contract demands when negotiations were unsuccessful in producing a successor agreement. (JA 45, 120.) Early in the morning on July 2, after an all-night negotiating session, the parties reached agreement on the terms of a new contract, subject to ratification by the Union's members. (JA 45.) At this point there was discussion of a "back-to-work"

agreement (addressed to issues that developed during the strike not dealt with in the tentative agreement), a draft of which Petitioner's representative, Bruce Woolpert, presented to the Union's representative, George Netto. (JA 45-46, 112, 140-41, 158-59.) Although the ensuing conversation about this development is controverted, it is undisputed that Netto expressed concern about a provision in Woolpert's draft that would have retained for a limited period of time the employees of a subcontractor who performed the work of the Union members during the strike. (JA 140-41, 159-60.) Nonetheless, Netto immediately withdrew all picketing and arranged for a meeting of the strikers at the Union's hall for 9:00 a.m. that same morning. (JA 162-63.)

The tentative new agreement was read and discussed at the membership meeting, but according to Netto's testimony in the District Court, he explained to the members that a ratification vote would not be taken until the parties had reached agreement on a back-to-work agreement. (JA 46, 166.) He also testified that an informal vote was taken on an Employer proposal dealing with a Saturday work provision that was included in the tentative agreement but had been particularly controversial during negotiations. (JA 166-68.) Later the same morning, Netto faxed Woolpert a counter-proposal to the proposed back-to-work agreement submitted by Woolpert at the close of their negotiations. (JA 168-71.) It was rejected, and on July 6, the Union renewed its strike and picketing. (JA 185.) Negotiations continued thereafter in an effort to reach a return to work agreement, but none was concluded. (JA 176-77.)

Finally, a successful ratification vote was conducted on August 22, 2004 to accept the tentative agreement for a successor contract, but the work stoppage continued in consequence of picketing attributable to a separate strike against Granite Rock involving a different bargaining unit. (JA 313, 325.) In mid-September, the latter labor dispute was settled and all Granite Rock employees returned to work. (JA 313.) The successor collective bargaining agreement was not executed until December 17, 2004, but was made effective retroactive to May 1, 2004, the day following the expiration date of the prior agreement. (JA 325.)

B. Proceedings in the District Court

This case originally came before the District Court on July 26, 2004, upon Granite Rock's application for injunctive relief against the then ongoing strike. (JA 83-84.) An Amended Complaint had been filed alleging that the strike violated the no-strike provision of the collective bargaining agreement which Granite Rock asserted to have been in effect since July 2. (JA 72-74.) Jurisdiction was premised on Section 301 of the Labor Management Relations Act (29 U.S.C. § 185). (JA 70.) The Complaint alleged, *inter alia*, that Granite Rock was "willing to participate in the grievance and arbitration proceedings provided in the Agreement, subject to all rights and defenses available to it." (JA 76.)

During the course of the injunction hearing, and after colloquy between the District Court judge and counsel in which the nature and circumstances of the case were aired, the court conducted a hearing on the issue of contract ratification. (JA 117.) Before taking evidence on the ratification issue, the District Court, without objection of the parties, consolidated

the hearing with the merits of the case. *See* Rule 65(a)(2), Fed.R.Civ.P.. (JA 116-17, 211.) At the conclusion of the testimony, the court issued a bench decision in which the court credited Business Agent Netto's testimony, found that the tentative agreement had not been ratified, denied Granite Rock's request for injunctive relief, and dismissed the case in its entirety. (JA 204-11.)

On August 9, 2004, following the District Court's dismissal of the action, Petitioner filed a motion for a new trial (Rule 59, Fed.R.Civ.P.), supported by a declaration of one of its drivers stating that he attended the July 2, 2004 membership meeting and that the tentative agreement was in fact ratified at that meeting. (JA 214-16, 217-21; Dkt. # 16.[1]). Following limited discovery, the court granted the motion on January 24, 2005. (JA 222-25.) In its Answer to the First Amended Complaint filed on February 17, 2005, Local 287 asserted as an affirmative defense "that [the Union's] alleged conduct for which [Granite Rock] seeks damages—striking in breach of a no-strike clause—presents a dispute that is subject to the grievance and arbitration provisions of the collective bargaining agreement now in effect between the parties. . . . " (Dkt. # 43.) Local 287's position in this respect was thereafter repeated in three separate pre-trial motions to compel arbitration. The first (Dkt. # 48), which was combined with an alternative motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, was denied on the ground that it was "misplaced at this time." (JA 231.) The District Court explained that it "must first decide whether a contract exists before

---

[1] All docket citations refer to the District Court's docket.

either party can be subject to or ordered to take their dispute to arbitration." (*Id.* at 232.)

This ruling was followed by a second motion (Dkt. # 66) filed by the Union seeking, *inter alia*, partial arbitration of Petitioner's claims, *i.e.*, arbitration of the issues of contract violation and damages in the event that there was a judicial determination that the contract had been ratified. That motion was granted. (JA 234-48.)

The Union filed a third pre-trial motion (Dkt. # 213), again raising the question of arbitrability, shortly after the issuance of the decision of the Ninth Circuit in *Nagrampa v. Mailcoups, Inc.*, 469 F.3d. 1257 (9th Cir. 2006) (en banc). (Dkt. # 213.) Following this Court's decision in *Prima Paint Corporation v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), the Ninth Circuit acknowledged in *Nagrampa* that a challenge to the validity of a contract containing an arbitration clause was to be resolved by arbitration, if the challenge was not directed to the arbitration clause itself but to the contract as a whole. *Nagrampa*, 469 F.3d at 1264, 1268-70.[2] The Union's motion argued that *Nagrampa*, a case brought under the Federal Arbitration Act ("FAA"), was applicable in this case, since the Union's challenge was to the entire contract, and certainly not to the arbitration clause which it sought to enforce. The District Court again disagreed, stating, "Since the resolution of the ratification issue is inextricably tied to the existence of any contract to arbitrate, the Court reaffirms its decision to decide this question in the first stage of this bifurcated proceeding." (JA 361.)

---

[2] The contract in *Prima Paint* was challenged on the ground of fraud in the inducement but "no claim is made that fraud was directed to the arbitration clause itself." 388 U.S. at 402.

Thereafter, in late April and early May, 2007, this case was tried by a jury to resolve the dispute as to whether the tentative agreement had been ratified. The jury found that the tentative agreement had been ratified July 2, 2004 at the membership meeting on that day. (JA 378-80.)

C. Proceedings in the Ninth Circuit

On appeal the Ninth Circuit sustained the Union's position that the dispute over ratification should have been referred to arbitration. The case was remanded to the District Court "with instructions that Granite Rock and Local 287 should be compelled to arbitrate their dispute in its entirety." (JA 61.)[3] Quoting from this Court's decision in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006), the Appellate Court's decision states that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." This principle, according to the Appellate Court, is applicable to challenges, as here, "to contract formation or to the contract as a whole—provided that both parties have consented." (JA 61.) As explained in the Court's opinion (JA 60):

---

[3] The Union also appealed from the District Court's rulings denying its motions (1) to strike Petitioner's demand for a jury trial; (2) to dismiss the complaint on the ground that Petitioner's position concerning the ratification issue was precluded by the finding of the NRLB in a related case that a ratification vote had not been taken; and (3) its post-verdict alternative motion for a new trial or judgment as a matter of law (Rules 50(b) and 59 (a), Fed.R.Civ.P.). The Ninth Circuit did not address these issues in the light of its disposition of the appeal on the basis of its determination of the arbitration issue. (JA 47.)

> Here, both parties consented to arbitration; Granite Rock implicitly by suing under the contract containing the arbitration clause, and Local 287 explicitly by asserting the arbitration clause.
>
> * * *
>
> When the parties have both consented to arbitration there are no concerns about arbitrators imposing themselves upon parties. If a party sues under a contract containing a broad arbitration clause, logic dictates that the most reliable way of honoring the parties' expectations is to enforce that arbitration clause from the outset unless the other party shows it never agreed to arbitrate.

In addition, the Ninth Circuit's opinion rejects Granite Rock's separate argument that the arbitration provision involved in this case "does not cover a dispute over formation." (JA 58, n.4.) The contract grievance and arbitration language, extends to "[a]ll disputes arising under this agreement." (JA 434.) The Appellate Court's opinion states that this language plainly satisfies the standard established by this Court that arbitration is required wherever the contract language is "susceptible of an interpretation" that covers the dispute. *See United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). (JA 59.) Accordingly, the Court remanded the case to the District Court "with instructions that Granite Rock and Local 287 should be compelled to arbitrate their dispute in its entirety." (JA 61.)

D. Proceedings Before the NLRB

The events in this case were also the subject of a separate proceeding before the National Labor Rela-

tions Board. See Teamsters Local 287 (Granite Rock Company), 347 N.L.R.B. 339 (2006). The Complaint in that case, based on a bad faith bargaining unfair labor practice charge filed by Granite Rock, alleged that Local 287 had violated Section 8(b)(3) of the Act by delaying the ratification vote on the tentative agreement of July 2, 2004, until August 22, 2004. *Id.* at 341. Evidence was submitted during the hearing in May, 2005, before the Administrative Law Judge ("ALJ") concerning, *inter alia*, the Union's membership meeting following the conclusion of the negotiations on the morning of July 2. *Id.* at 343. The ALJ concluded in his decision that the Union had failed to bargain in good faith by not conducting a ratification vote during the membership meeting on July 2. *Id.* at 345. However, the ALJ rejected Petitioner's contention that the ratification vote had in fact been held and further that the tentative agreement had in fact been ratified. *Id.* at 344, n.5 (" . . . I find no evidence that the employees ratified the contract on July 2.").

On review, the Board on May 31, 2006, sustained the ALJ's finding that the tentative agreement had not been ratified on July 2. *Id.* at 339 ("In the instant case, ratification did not occur until August 22."). The Board also upheld his conclusion that the Union's delay in ratifying the tentative agreement constituted bad faith bargaining. *Id.* at 339, 340. In addition, the Board upheld Granite Rock's contention that the Board's remedy should provide that the agreement, as finally executed, be given retroactive effect to July 2, 2004. *Id.*

The Ninth Circuit, in a short unpublished decision, enforced the Board's Decision and Order. *Teamsters Local 287 v. N.L.R.B.*, 293 Fed.App. 518 (9th Cir. 2008).

SUMMARY OF ARGUMENT

There are two distinct, but compatible analyses that require affirmation of the Appellate Court's decision.

First, as the Ninth Circuit found, both parties demonstrated their consent to comply with the agreement's grievance and arbitration provisions to resolve the dispute as to whether the tentative agreement reached at the bargaining table had been ratified on July 2, 2004. Petitioner's commitment to arbitration was by way of bringing this lawsuit asserting that the agreement had in fact been ratified on that day and was in full force and effect from July 2 forward. In these circumstances a plaintiff subjects itself to a contractual obligation to comply with all provisions in the agreement, including its arbitration provision. This principle is well established under the Federal Arbitration Act, and because it is fully consistent with federal policy favoring arbitration of labor disputes, it is appropriate to apply it in Section 301 cases. The Union, of course, committed itself to arbitration of the dispute by filing motions to compel its arbitration.

Contrary to Petitioner's argument, the submission of the dispute to an arbitrator in the circumstances of this case does not offend the general rule against permitting an arbitrator to determine his/her own jurisdiction. Although an arbitration award in this case might establish that the tentative agreement was not ratified, which would negate the existence of the arbitration clause, or a judicial determination that there had been ratification, as happened in this case, which would mean that the dispute belonged in arbitration. This Court has ruled, however, that this "conundrum" has been resolved in favor of arbitra-

tion. *See Buckeye*, 546 U.S. at 448-49, citing *Prima Paint*, 388 U.S. at 395.

Nor does the Union's position take issue with the rule that courts, and not arbitrators, are to decide disputes over whether the parties have an obligation to arbitrate particular matters. The Union's motions did not request the District Court to require an arbitrator to decide whether the parties' dispute was to be arbitrated; the Union requested the District Court to make that decision. If the dispute in this case is to be arbitrated, it will be because this Court affirms the ruling of the Court of Appeals, and not because of a "gateway" ruling of an arbitrator.

The second discrete ground for affirming the decision below is that the tentative agreement was concededly in existence when the Union filed its motions to compel arbitration. Petitioner could no longer argue that there had to be a court decision as to the existence of the agreement before it had a contractual duty to comply with the arbitration provision. The underlying dispute had become whether the no-strike obligation was in effect during a particular period of time in the past. Petitioner does not and could not argue that it was not bound by the entire agreement, including its arbitration clause, when the matter came before the District Court during the post strike period.

The Petitioner's argument that the dispute the Union sought to have arbitrated is not within the scope of the arbitration provision is wholly without merit. That clause covers "[a]ll disputes arising under this agreement." (JA 434.) The Ninth Circuit answered the argument summarily in stating "[b]ecause Granite Rock is suing under the alleged new CBA, the arbitration is certainly susceptible of

an interpretation that covers the dispute" (JA 59), quoting from *Warrior & Gulf*, 363 U.S. at 582-83. That is all that is necessary under the strong presumption of arbitratbility of labor disputes, which carries with it the admonition that "[d]oubts should be resolved in favor of coverage." *Id.*

ARGUMENT

I. INTRODUCTION: THE SOURCE OF THE GOVERNING LAW

Local 287's position in this case is that Petitioner was required to pursue its claim that the Union violated the no-strike clause through the grievance and arbitration provisions in the contract on which it relies in asserting that claim. *See Drake Bakeries, Inc. v. Local 50, Am. Bakery & Confectionery Workers*, 370 U.S. 254 (1962). The persistent theme of Petitioner's opposing argument is that it did not agree to arbitrate that issue; that whether it was under a contractual obligation to arbitrate cannot be ascertained until the ratification issue is resolved, a matter that is the responsibility of the court and not an arbitrator.

We show below that this line of reasoning cannot be sustained under the decisional law of this Court. Initially, however, we think it is helpful to an understanding of the decision below to discuss briefly the interplay between Section 301 of the Labor Management Relations Act (29 U.S.C. § 185) and the Federal Arbitration Act ("FAA") (9 U.S.C. § 1 *et seq.*) as the decisional law under these two statutes bear upon this case.

Jurisdiction of the subject matter in this case lies in Section 301, and not the FAA which in any event is not a jurisdictional statute. *Moses H. Cone Memorial*

Hospital v. Mercury Construction Corporation, 460 U.S. 1, 26, n.32 (1983).[4] The Ninth Circuit decision, however, relies on this Court's decisions applying the FAA. The implicit and proper reading of this circumstance is that the principles underlying the FAA decisions cited by the Ninth Circuit are equally cogent in Section 301 cases. The fusion of case law under the FAA with Section 301 decisions is in full accord with the explanation of this Court in *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957), that "the substantive law to apply in suits under Section 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." *Id.* at 456. The FAA has been a prominent source of rules and guidance for federal courts in developing substantive law under Section 301. Indeed, this Court expressly acknowledged as much in *United Paperworkers v. Misco*, 484 U.S. 29 (1987), where it looked to the FAA for guidance in determining the scope of judicial review to be given an arbitration award that was before the Court in a Section 301 case. As stated in *Misco*, 484 U.S. at 41, n.9:

> [T]he federal courts have often looked to the [Federal Arbitration] Act for guidance in labor arbitration cases, especially in the wake of the holding that Section 301 . . . empowers the federal

---

[4] As stated in the decision cited in the text, "[t]he Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet is does not create any independent federal-question jurisdiction under [28 U.S.C. § 1331] or otherwise." *See also, Vaden v. Discover Bank*, 556 U.S. ___, 129 S. Ct. 1262, 1271-72 (2009); and *Hall Street Associates v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396, 1402 (2008).

> courts to fashion rules of federal common law to govern '[s]uits for violation of contracts between an employer and a labor organization' . . . .

In counterpart, this Court's FAA decisions frequently cite Section 301 arbitration decisions in support of assertions having to do with the federal policy favoring arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 626 (1985); *First Options v. Kaplan*, 514 U.S. 938, 944-45 (1995); *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 83-85 (2002); *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452 (2003); *see also 14 Penn Plaza v. Pyett*, 556 U.S. ___, 129 S. Ct. 1456, 1462 (2009) (motion to compel arbitration pursuant to collective bargaining agreement brought under FAA).[5]

It is accordingly not surprising that the Ninth Circuit looked to the relevant FAA line of decisions that relate directly to the issue in this case as an appropriate precedent to be added to the evolving body of substantive law under Section 301. Both statutes reflect strong national policy favorable to arbitration. *See Moses H. Cone Hospital*, 460 U.S. at 24-25 ("the [Federal] Arbitration Act establishes that, as a matter of federal law, any doubts concerning the

---

[5] The effect of this Court's decision in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), on the application of the FAA to Section 301 cases need not be addressed here. As found by the court below, and discussed *infra*, pp. 14-18, both parties here have accepted a contractual obligation to comply with the arbitration provision of the tentative agreement, which negates any limitations the FAA might otherwise impose in the circumstances of this case, but certainly would not restrain the Court from looking to that statute for guidance in developing Section 301 substantive law that promotes federal labor law policy in labor arbitration cases.

scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability"). As summarized by this Court with respect to Section 301, "The federal policy favoring arbitration of labor disputes is firmly grounded in congressional command." *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368, 377 (1974), quoting § 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d). In short, the Ninth Circuit's application of FAA precedent in concluding that the dispute between the parties in a Section 301 case is subject to arbitration stands on solid legal footing. Petitioner has not argued to the contrary.

II. GRANITE ROCK WAS SUBJECT TO A CONTRACTUAL OBLIGATION TO ARBITRATE THE DISPUTE WITH LOCAL 287

1. Analysis of the merits of this case begins with an acknowledgement of the settled rule that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Warrior & Gulf*, 363 U.S. at 582; *see also, First Options*, 514 U.S. at 942-43; *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986). It is also settled law, however, that an agreement to arbitrate may be found where a party's conduct is such that legally binds it to comply with the arbitration provision contained in the contract. *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1064 (2nd Cir. 1993).

This Court's decision in *John Wiley & Sons, Inc. v. David Livingston*, 376 U.S. 543 (1964), illustrates the point. A union there sought arbitration of contrac-

tual claims against the successor to the employer with which it had a collective bargaining agreement. The successor company denied being a party to the agreement, and specifically denied any obligation under its arbitration provision. The Court treated the issue, not as involving the question of whether the successor company had intentionally or expressly made a commitment to accept the arbitration provision in the agreement, but rather as whether the circumstances justified a "determination that the collective bargaining agreement does in fact create such a duty." *Id.* at 547. In short, conventional rules of contract law may create contractual obligations by reason of the conduct of a party irrespective of the fact that the obligor does not explicitly commit himself to the bound by the agreement. In *Wiley* the protesting successor was held to comply with the arbitration clause by reason of " . . . the impressive policy considerations favoring arbitration" that underlie Section 301. *Id.* at 550.

The law in this area is more fully developed under the FAA than under Section 301. Thus, under FAA, a plaintiff suing to enforce a contractual claim will be equitably estopped from refusing to comply with an arbitration provision in the contract that covers its claim. *See Avila Group v. Norma J of California*, 426 F.Supp. 537, 541-42 (S.D.N.Y. 1977) ("[A plaintiff] cannot be allowed to assert the existence of a valid contract . . . to recover damages from [a defendant] . . . and at the same time contradictorily assert that no contract exists in order to avoid arbitration of its claims . . . ."); *Sunkist Soft Drinks v. Sunkist Growers*, 10 F.3d 753, 757 (11th Cir. 1993) (" . . . since the plaintiff ultimately must rely on the terms of the . . . agreement in its claims against [defendant], the plaintiff was equitably estopped from repudiating

the arbitration clause of the agreement . . . "), *citing Hughes Masonry v. Greater Clark County School Bldg. Corp.*, 659 F.2d 836, 838 (8th Cir. 1981); *International Paper Company v. Schwabedissen Maschinen & Anlagen*, 206 F.3d 411, 417-18 (4th Cir. 2000) ("[P]laintiff cannot seek to enforce those contractual rights and avoid the contract's requirement that 'any dispute arising out of the contract be arbitrated.").[6] This line of decisions fully respects the Section 301 policy favoring arbitration. Indeed, this Court applied the same principle to hold that an employee whose claim is based on breach of a collective bargaining agreement was bound by the arbitration provision of the contract. *Vaca v. Sipes*, 386 U.S. 171, 184 (1967). There is no reason for ignoring this decisional law in determining whether a plaintiff in a Section 301 action is obligated to arbitrate a dispute within the scope of an arbitration provision.

In the legal setting described above, there is no alternative to the conclusion that, by filing the lawsuit, Granite Rock bound itself to comply with the arbitration clause as well as all other provisions in the agreement reached at the bargaining table. That agreement assigns breach of contract disputes to be resolved by the procedures established in its griev-

---

[6] *See also Sourcing Unlimited, Inc. v. Asimco International, Inc.*, 526 F.3d 38, 47-48 (1st Cir. 2008) (signatory's tort claims were intertwined with a contract that included an arbitration clause, therefore, signatory was estopped from denying obligation to arbitrate); *Grigson v. Creative Artists Agency*, 210 F.3d 524, 527-38 (2000) (estoppel applied to require arbitration where plaintiff's claims arose out of contractual arrangement with non-signatory defendant); *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999) (court will compel arbitration where signatory to contract with an arbitration provision sues for non-signatory's alleged violations of the agreement).

ance and arbitration provision. (*See* the discussion *infra*, pp. 26-29.) Granite Rock's First Amended Complaint alleged that the contract was in full force and effect and that Local 287 had violated its no-strike provision. (JA 73-75.) This Court established in 1962 that an alleged breach of a no-strike clause accompanied by a standard arbitration provision was subject to arbitration, and could not be tried judicially as an original matter pursuant to Section 301. *Drake Bakeries*, 370 U.S. at 265 66; *see also Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965).

The Ninth Circuit accurately characterized Petitioner's conduct as "implicitly" acknowledging the arbitrability of its charge that Local 287 violated the no-strike clause of the agreement. (JA 60.) In denying this to be true, Petitioner necessarily argues that it can initiate a process in which decisional law incorporates arbitration as an essential component without being bound to arbitrate disputes that process requires to be arbitrated. As we have shown, however, "[Petitioner] cannot have it both ways. [It] cannot rely on the contract, when it works to [its] advantage, and repudiate it when it works to [its] disadvantage." *Hughes Masonry*, 659 F.2d at 839, *quoting Tepper Realty Co. v. Mosaic Tile Co.*, 259 F.Supp. 688, 692 (S.D.N.Y. 1966). In short, Petitioner is subject to and bound by the arbitration procedures in the agreement it asserts to be in full force and effect no less than would be the case had Petitioner expressly agreed to be bound.

Local 287's consent to arbitrate the dispute is, of course, manifested by its motions to compel arbitration. We add only that the Union may follow this course while concurrently pressing its position that the tentative agreement was not ratified. In *Prima*

Paint, 388 U.S. at 395, a case decided under FAA, the Court approved the rule that "arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded," and that if not independently challenged operate to require arbitration of disputes covered by the arbitration provision of the agreement. *Id.* at 402. Local 287 has obviously consented to arbitration as a process by which to resolve the ratification issue, just as Petitioner has acquired an obligation to arbitrate that issue by bringing this lawsuit. Just as obviously, the Court's "separability" ruling in *Prima Paint* serves the federal policy favoring arbitration that underlies both FAA and Section 301.

2. The *Prima Paint* decision addresses situations where the issue is whether asserted defenses affecting the validity of a contract are to be resolved by the court or in arbitration. The dilemma in that context is that if an arbitrator finds the contract to be invalid, the case should not have been brought before him. If a court were to reject the invalidity argument, it would follow that the case should have been heard by an arbitrator. Recognizing this analytical problem, the *Prima Paint* court ruled in favor of arbitration, unless there was a challenge directed at the arbitration clause itself, raising an issue of whether the parties had excluded the particular dispute from arbitration. The same problem of logic exists in the instant case. Petitioner's argument that the contract was ratified can only mean that the ratification dispute should have been arbitrated. If an arbitrator were to accept Local 287's contention that the contract was not ratified, however, there would be no basis for the dispute to be given to the arbitrator. As stated by this Court in *Buckeye*, 546 U.S. at 448:

> It is true . . . that the *Prima Paint* rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void. But it is equally true that respondents approach permits a court to deny effect to an arbitration provision that the court later finds to be perfectly enforceable. *Prima Paint* resolved this conundrum—and resolved it in favor of separate enforceability of arbitration provisions.

The Ninth Circuit applied the *Prima Paint* ruling in the present case, noting correctly (JA 61):

> The challenge here regards contract formation. Granite Rock does not challenge the arbitration independently, and both parties have consented to arbitration. As such Granite Rock's claims against Local 287 should have been dismissed in favor of arbitration.

3. The *Buckeye* Court noted, however, that its holding addressed only cases in which the contract at issue was challenged as void or voidable, and not where there was a dispute about whether "any agreement between the alleged obligor and obligee was ever concluded." 346 U.S. at 444, n.1. We do not think it necessary to confront that reserved question in the present case. The rationale for the notion that a contract formation dispute is not arbitrable is simply that if there is no contract there can be no arbitration requirement, and thus the existence of a contract must first be established before the arbitrability of a dispute can be addressed. This was the reasoning of the District Court in denying Local 287's motion to compel arbitration. (JA 360-61.)

The present case, however, does not accommodate this rationale. The reservation in *Buckeye* concerning

contract formation would apply to a situation where a motion to compel arbitration, which of course binds the movant to arbitration, is brought against an opposing party that denies that the contract containing an arbitration clause was ever concluded. This was the situation in *First Options*, 514 U.S. at 938. The situation here is quite different. Both Granite Rock and Local 287 are legally committed to arbitrate this dispute over ratification, Granite Rock "implicitly" by suing to enforce the tentative agreement, and Local 287 by moving to compel arbitration. Moreover, as we show in heading III (*infra,* pp. 26-27) there was concededly an agreement in effect when the Union filed its motions to compel arbitration. There is certainly nothing in the relevant arbitration decisional law either under Section 301 or FAA, that precludes parties from agreeing to arbitrate their dispute as to whether the necessary steps have been taken to create a binding agreement between them. That, in effect, is what has happened here.

The Amicus Brief of the Chamber of Commerce analogizes the Union's position to a "gun to the head" hypothetical (Amicus Br. at 15, n.3.) But no one asserts that there was "gun to the head" of Granite Rock when it sought to enforce the contract, first by injunctive relief and then by continuing its claim for damages, or that there was a "gun to the head" of Local 287 when it sought to enforce the arbitration clause of the contract by motion. Neither party asserts forgery. The positions of both parties are premised on the existence of an agreement to arbitrate. The Chamber's Brief, taken in context, estab-

lishes, rather, the immateriality of Granite Rock's arguments as supported by the several *amici*.[7]

4. Granite Rock correctly argues that the decisional law of this Court requires that a dispute over the existence of mutual obligations to arbitrate is to be resolved by judicial determination, and not through arbitration. That is the course the Union has followed in this case by filing its motions to compel arbitration. Local 287's motions to compel arbitration were not tailored to have an arbitrator decide whether Granite Rock had an obligation to resolve the underlying dispute through arbitration. The motions, rather, requested the District Court to make that decision. As matters stand, the Ninth Circuit has made the "gateway" decision that arbitration is required. If the Union's position is sustained, the

---

[7] Granite Rock relies heavily on the Third Circuit's analysis in *Sandvik AB v. Advent Int'l. Corp.*, 220 F.3d 99 (3rd Cir. 2000). The factual situation in *Sandvik* is analogous to that in this case in that the "party suing on a contract containing an arbitration clause resists arbitration, and the defendant, who denies the existence of the contract, moves to compel it." *Id.* at 100. The *Sandvik* Court, however, read this Court's decision in *Prima Paint* (*see* 388 U.S. at 403-04), to require arbitration of disputes over the validity of contracts where there is no separate challenge to the validity of the arbitration provision, to apply only where the contract dispute was voidable, and not where the contract was void from its inception. ("Rather, we conclude that the doctrine of severability presumes an underlying, existent, agreement.") *Id.* at 105. This is no longer an acceptable interpretation, in view of this Court's rejection of any such distinction in *Buckeye*, 546 U.S. at 446. In addition *Sandvik* involves an issue of whether an agreement "ever existed" (*id.*), unlike here where it is uncontested that an agreement was concluded well before the Union filed motions to compel arbitration (*infra*, pp. 26-27).

arbitrator will be adjudicating the dispute between the parties in consequence of a judicial ruling.

What has been said above also disposes of Granite Rock's related argument that the Ninth Circuit's decision "gives an arbitrator the power to determine his or her own jurisdiction . . . ." (Pet'r Br. at 28.) Again, the Union's motion to compel arbitration sought the District Court's determination of the arbitrator's authority, not an order calling for the arbitrator to determine that question. The motion, if granted, would have been based on the Court's ruling that the arbitrator should decide the merits of the underlying dispute, *i.e.*, whether Petitioner's breach of the no-strike clause claim had merit, including whether Local 287's defense to that claim was valid. The arbitrator plainly would have had no reason or cause to examine the scope of the grievance and arbitration provisions involved; that issue had to be decided by the Court in the Union's favor as a prerequisite to granting the motion. There would be two possibilities in the arbitrator's disposition of the case. An award in favor of the Union would mean that there was no contract in effect (and hence no arbitration provision). Conversely, an award in favor of Petitioner would establish the impropriety of Petitioner's lawsuit. Indeed, the jury verdict obtained by Petitioner in this case established just that, *i.e.*, the case belonged in arbitration. But as stated above, there is a certain amount of perplexity in dealing with cases where there is an unchallenged arbitration provision in a contract whose validity is under attack. This "conundrum" was resolved in 1967 in

favor of arbitration. *Buckeye*, 546 U.S. at 448-49, citing *Prima Paint*, 388 U.S. at 395.[8]

The irony of Granite Rock's position that the contract formation issue should be decided by the District Court is that it seeks to have the District Court decide the merits of the underlying dispute between the contending parties, precisely the result found unacceptable in *AT&T Technologies*, the Court's decision on which Petitioner principally relies. As stated in that decision, "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *AT&T Technologies*, 475 U.S. at 649-50; *see also* Justice Brennan's concurring opinion, 475 U.S. 753, 652-56.

5. Granite Rock speculates that "three disruptions to industrial peace [will] flow from the Ninth Circuit decision." (Pet'r Br. at 28.) There is little to be said for any of Granite Rock's opinions on the subject.

The first is an assertion that parties to labor agreements would be reluctant to enter into arbitration agreements if an arbitrator is empowered "to determine his/her own jurisdiction, which, in turn, could be manipulated to serve his or her own best interests." (Pet'r Br. at 28.) The short answer, as we have discussed *supra*, pp. 21-22, is that the Ninth Circuit's decision does not authorize arbitrators to determine their own jurisdiction. It is indeed the Ninth Circuit's decision that establishes and circumscribes the scope of the arbitrator's role in this case.

---

[8] The same problem was inherently presented, although not discussed, in *Preston v. Ferrer*, 552 U.S. 346, 128 S. Ct. 978 (2008), where resolution of the factual dispute that was referred to arbitration would also determine whether there was a contract that provided for arbitration.

The second alleged threat to industrial peace is that the decision below allows "one party to enforce an arbitration clause without giving effect to . . . the no-strike provision . . . ." (Pet'r Br. at 29.) This argument is hard to follow. The procedure for enforcing a no-strike clause is shared by the courts and arbitrators where, as here, alleged violations of a no-strike provision are subject to arbitration. Granite Rock failed to obtain injunctive relief in the present case, not because the District Court was without jurisdiction, but because the District Court, following hearing, thought the credible evidence was insufficient to grant that relief. However that may be, there is absolutely nothing in the decision below that restricts an employer from obtaining a judicial remedy for breach of a no-strike clause, other than to the extent to which the employer has assumed a contractual obligation to seek such relief in arbitration. Needless to say, Granite Rock did not apply for a remedy from an arbitrator relating to the alleged breach of the no-strike clause involved in this case.

Finally, Granite Rock complains that the decision below discourages the useful practice of reaching "tentative agreements" in contract negotiations by allowing parties "to dispute that a binding contract exists while simultaneously availing themselves of arbitration." (Pet'r Br. at 29.) The theme of Granite Rock's litigation, however, is that the agreement on which it sued was not tentative, but in full force and effect. There is no discouragement in the utilization of appropriate negotiation practices in holding a party to compliance with an arbitration clause in an agreement it asserts to be in effect.

III. THE DISTRICT COURT ERRED IN FAILING TO COMPEL ARBITRATION AT A TIME THE AGREEMENT WAS CONCEDEDLY IN FULL FORCE AND EFFECT

A. The Tentative Agreement Was in Existence when Local 287 Filed its Motion to Compel

Granite Rock filed the instant lawsuit because Local 287 disputed the ratification of the agreement reached at the bargaining table, contending it was under no obligation to end its strike. In the course of time, however, the agreement was executed and acknowledged by both parties to be in effect no later than August 22, 2004, and in any case, no later than mid-December, when the document was executed, retroactive to May 1. (JA 448.) The initial pleading by which Local 287 presented its position relevant to the present posture of this case was February 17, 2005, when it filed its Answer to the First Amended Complaint. (Dkt. # 43.) The delay in this filing is explained by the District Court's dismissal of the case on July 26, 2004, followed by Petitioner's Motion for a New Trial, then the discovery ordered by the District Judge, and finally the Order granting the Motion for a New Trial. (*Supra*, p. 4.) Local 287's Answer alleged as an affirmative defense "that [Local 287's] alleged conduct for which [Granite Rock] seeks damages—striking in breach of a no-strike clause—presents a dispute that is subject to the grievance and arbitration provisions of the collective bargaining agreement *now in effect*, and for that reason the Court may not assert jurisdiction at this time." (Dkt. # 43, emphasis added.)

At that time, neither party denied that the agreement was in full force and effect; it had been ratified

by the Union's members and signed by both parties. The agreement was made retroactive to May 1, 2004, with an expiration date of April 30, 2008.[9] The arbitration provision, which was an integral part of the agreement, was undeniably operative at the time Local 287 answered the First Amended Complaint. Nonetheless, Granite Rock declined to arbitrate the dispute, and opposed each of the motions filed by Local 287 to compel arbitration. Granite Rock's consistent position that the existence of the agreement after July 2 had to be established by the District Court before any arbitrability issue could be addressed had become meaningless. Both parties were in agreement that the contract was in full force and effect. It is, of course, settled law that the grievance and arbitration provisions of a collective bargaining agreement must be pursued to resolve disputes within their scope. In this sense, the contract provisions preempt court proceedings, at least in the initial stage of efforts by the parties to vindicate their positions. As stated in *Republic Steel*, 379 U.S. at 653:

> If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements" (*quoting Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962)).

---

[9] Neither party has raised an issue as to the effect the retroactivity given to the term of the agreement may have on their respective positions involved in their dispute. In the Union's view, the silence of the parties in this respect need not preclude that question from surfacing in the arbitration hearing, if the decision below is affimed.

B. The Presumption of Arbitrability Overcomes Petitioner's Defenses

It cannot be legitimately questioned that Granite Rock's claim that the Union violated the no-strike clause on its face was subject to the grievance/arbitration provisions of the contract. Indeed, the District Court ordered the question of whether the Union's conduct breached the no strike clause to arbitration, including the issue of damages, and that ruling is not challenged here. (JA 246.) This is required by the Court's seminal ruling in *Drake Bakeries*, that a strike by a union does not relieve the employer of the obligation to grieve its claim against the union for a strike in violation of the agreement. *See also, Local Union No. 721, United Packinghouse, Food and Allied Workers v. Needham Packing Co.*, 376 U.S. 247, 248-49, 251-53 (1964). Those decisions reject the assertion that the Union's conduct effectively repudiated the grievance procedure. Whether the asserted strike is authorized or not, the employer must invoke the arbitration procedures and in Granite Rock's words "subject to all rights and defenses available to it." (JA 76, ¶ 17.)

Petitioner nonetheless appears to be renewing its position, which it presented "briefly" in the Ninth Circuit (JA 58, n.4) that the arbitration provision in this case does not cover the no-strike violation/ratification issues involved in the parties' dispute. (*See* Pet'r Br. at 23-24.) Section 20 of the agreement requires "[a]ll disputes arising under this agreement" to be resolved by arbitration, if not settled at the pre-arbitration steps of the grievance procedure. The scope of the arbitration clause is, of course, a matter for courts to determine, but in doing so courts are instructed, as the Ninth Circuit points out, that "[a]n

order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." (JA 58, n.4, quoting this Court's decision in *Warrior & Gulf*, 363 U.S. 582-83.) In disposing of Petitioner's argument, the Ninth Circuit stated: "Because Granite Rock is suing 'under' the alleged new collective bargaining agreement, the arbitration clause is certainly 'susceptible of an interpretation' that covers the dispute." (JA 58-59.)

Granite Rock asserts, nonetheless, that "Nothing in the Agreement suggests that the parties agreed to arbitrate disputes over whether the Agreement existed." (Pet'r Br. at 12.) But that is precisely backward and immaterial. There was a contract in effect when the Court reinstated the First Amended Complaint in granting Granite Rock's motion for a new trial. In order to support its proposition Granite Rock must find some exception in the word "all" in Section 20 of the agreement which prefaces those disputes that are subject to arbitration: "all disputes arising under this agreement." (JA 434.) Granite Rock points to no such express exclusion.[10]

---

[10] Granite Rock turns the analysis on its head by arguing " . . . Granite Rock and the Union did not 'clearly and unmistakably' consent to arbitrate whether a contract was created. *AT&T Technologies* . . ." That is a misapplication of this Court's opinion. The Court was referring not to whether something was arbitrable but whether the parties had agreed that the arbitrator could decide the arbitrability issue. Granite Rock devotes an entire section of its brief to this erroneous analysis that the "clear and unmistakable" doctrine applies to whether an issue is arbitrable. (Pet'r Br. at 23-24.)

The sequence of events works against Granite Rock's argument. Granite Rock knew about its claim at the time the parties were attempting to settle the resumed strike between July 6 and August 22. Granite Rock knew about Local 287's position at the time the Union ratified the agreement on August 22 and during the period between ratification and execution of the agreement in December. It could have sought some exclusion from the grievance procedure if it wanted to preserve its claim. Its failure to do so belies its claim that there is any such exclusion.

Drake Bakeries requires the Court to presume the parties intended to include this dispute among those subject to resolution through arbitration because it is not expressly exempted. 370 U.S. at. 259-60. ("[I]t would have been most appropriate . . . for the parties to have excluded from the arbitration procedures the company's claim for strike damages, if they had intended to so.") *See also Gateway Coal*, 414 U.S. at 379-80 (safety not excluded from arbitration even though it is a basic issue and there is doubt an arbitrator will have necessary concern for safety issues).[11] The language in Article 20 of the agreement in this case expressly excludes only certain disputes from arbitration. (*See* § 20(j) (JA 436-37) and § 1(c) (JA 397-98).) The dispute over ratification does not

---

[11] It may also be noted that federal labor law accommodates a grieving party to arbitrate a dispute it believes not to be arbitral without forfeiting its right to preserve its position for court adjudication in the event the arbitration ruling is adverse to that position. *See George Day Construction Co. v. Carpenters Local 354*, 622 F.2d 1471 (9th Cir. 1984). This was the process followed by the prevailing party in *First Options*, 514 U.S. 938 (1995). Granite Rock did not avail itself of this option.

appear as an exception. The underlying issue in this case—whether the tentative agreement was ratified on July 2, 2004—is clearly within the scope of the arbitration clause.

* * * *

The upshot is that there are alternative legal grounds on which Granite Rock was bound to arbitrate the underlying dispute: (1) the filing of the lawsuit which constituted an acceptance by Granite Rock of a contractual obligation to comply with the arbitration clause of the agreement; and (2) its refusal to arbitrate in response to Local 287's Motions to Compel Arbitration after the tentative agreement had been ratified and executed. Accordingly, by directing the District Court to send the "entire dispute" to arbitration, the Ninth Circuit "simply remit[ed] the company to the forum it agreed to use for processing its strike damage claims." *Drake Bakeries*, 370 U.S. at 266.

CONCLUSION

For all the reasons stated above, it is respectfully requested that the decision below be affirmed.

Respectfully submitted,

Of Counsel
DAVID ROSENFELD
WEINBERG, ROGER & ROSENFELD
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501
(510) 337-1001

DUANE B. BEESON
Counsel of Record for Teamsters Local 287
ROBERT BONSALL
HOLLY K. HERNDON
BEESON, TAYER & BODINE
1404 Franklin St., 5th Floor
Oakland, CA 94612
(510) 625-9700
Counsel for Respondents

October 26, 2009

REPLY BRIEF

Supreme Court, U.S.
FILED
NOV 25 2009
OFFICE OF THE CLERK

No. 08-1214

In The Supreme Court of The United States

GRANITE ROCK COMPANY,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS & TEAMSTERS LOCAL 287,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

ARTHUR R. MILLER
Of Counsel
NEW YORK UNIVERSITY
SCHOOL OF LAW
40 Washington Square South
Vanderbilt Hall 409D
New York, NY 10012
Telephone: 212.992.8147

GARRY G. MATHIASON
Counsel of Record
ALAN S. LEVINS
ADAM J. PETERS
RACHELLE L. WILLS
SOFIJA ANDERSON
LITTLER MENDELSON
650 California Street
20th Floor
San Francisco, CA 94108
Telephone: 415.433.1940

November 25, 2009

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES v

I. COURTS, NOT ARBITRATORS, HAVE THE AUTHORITY AND RESPONSIBILITY TO DETERMINE WHETHER A CONTRACT WAS FORMED. 1

A. Granite Rock's "Agreement" To Arbitrate Formation Cannot Be Implied 1

B. The July 2 Agreement Is Silent On Formation; Thus, There Is No "Clear And Unmistakable" Agreement To Arbitrate Formation And The Presumption Of Arbitrability Is Reversed 4

C. Neither *Prima Paint* Nor *Buckeye* Requires Arbitration Of Formation Disputes 6

D. Local 287 Understates The Adverse Consequences That The Decision Below Will Have On Industrial Peace 7

TABLE OF CONTENTS
(continued)

PAGE

E. Local 287's Newly Asserted Theory Regarding The Sham August 22 "Ratification" Is Untimely And Fails To Demonstrate Petitioner's Consent 8

II. GRANITE ROCK'S SUIT AGAINST IBT IS COGNIZABLE UNDER SECTION 301(a) BECAUSE IT IS CONSISTENT WITH THE STATUTE'S PLAIN LANGUAGE AND ITS PURPOSE TO ENFORCE LABOR CONTRACTS..... 12

A. Federal Courts Have Authority To Fashion A Remedy For Conduct Causing A Contract Violation; Section 301(a)'s Plain Language Bestows Jurisdiction And Congressional Intent Requires A Remedy. 12

B. IBT Cannot Escape Liability For Displacing Its Local And Directly Inducing A Company-Wide Strike Merely Because Its Duty To Honor The No-Strike Clause Was Not Expressly Stated In The Contract 16

TABLE OF CONTENTS
(continued)

PAGE

C. Congress Provided Federal Courts Authority To Enforce Existing Labor Contracts For The Benefit Of The Public, The Economy, And The Parties. 18

D. IBT's Parade Of Horribles Is Contradicted By Common Sense, Experience, And The Action's Narrow Application 22

1. Granite Rock's Proposed Action Will Not Cause Parties To Avoid Arbitrating Their Disputes Nor Will It Unduly Increase Federal Courts' Dockets 22

2. Granite Rock's Proposed Action Does Not Usurp Either Labor Arbitrators' Or The N.L.R.B.'s Respective Roles..... 25

3. Federal Courts Are Well-Equipped To Decide The Action Alleged By Granite Rock 26

TABLE OF CONTENTS
(continued)

PAGE

4. Granite Rock's Proposed Claim Will Not Result In Complex Procedural Problems 27

E. The Ninth Circuit's Decision Leaves Granite Rock Without A Remedy And Provides A Blueprint For International Unions To Demand Concessions From Employers Despite Their Locals' No-Strike Obligations 28

III. CONCLUSION 30

TABLE OF AUTHORITIES

PAGE

CASES

Allis-Chalmers Corp. v. Lueck,
471 U.S. 202 (1985) 16

AT&T Technologies, Inc. v. Commc'n Workers of Am.,
475 U.S. 643 (1986) ..... passim

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 13

Biedelman v. Stroh Brewing Co.,
182 F.3d 225 (3d Cir. 1999) 23-24

Binz v. Brandt Construction Co., Inc.,
301 F.3d 529 (7th Cir. 2002) 27

Brown v. Sandimo Materials,
250 F.3d 120 (2d Cir. 2001) 18

Buckeye Check Cashing, Inc. v. Cardegna,
546 U.S. 440 (2006) ..... passim

Burlington Indus. v. Ellerth,
524 U.S. 742 (1998) 24

Cargill, Inc. v. Monfort of Colorado, Inc.,
479 U.S. 104 (1986) 9

Chapa v. United States,
497 F.3d 883 (8th Cir. 2007) 27

TABLE OF AUTHORITIES
(continued)

PAGE

Cole v. Pathmark of Fairlawn,
672 F. Supp. 796 (D.N.J. 1987) 24

Complete Auto Transit, Inc. v. Reis,
451 U.S. 401 (1981) 29

Crull v. GEM Ins. Co.,
58 F.3d 1386 (9th Cir. 1995) 13

DelCostello v. Int'l Bhd. of Teamsters, et al.,
462 U.S. 151 (1983) 27

Deloitte Noraudit A/S v. Deloitte Haskins & Sells,
9 F.3d 1060 (2d Cir. 1993) 1, 2

Farmland Dairies v. Milk Drivers & Dairy Employees Union,
1997 U.S. Dist. LEXIS 7813
(D.N.J. Feb. 11, 1997) 24

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938 (1995) 1, 4, 6

Foley v. Interactive Data Corp.,
47 Cal. 3d 654 (1988) 22

Green Tree Fin. Corp. v. Bazzle,
539 U.S. 444 (2003) 1, 4

Howsam v. Dean Witter Reynolds, Inc.,
537 U.S. 79 (2002) 1, 4

TABLE OF AUTHORITIES
(continued)

PAGE

Imperial Ice Co. v. Rossier,
18 Cal.2d 33 (1941) 21

Int'l Assoc'n of Heath and Frost Insulators v. Absolute Environmental Service, Inc.,
814 F. Supp. 392 (D. Del. 1993) 24

Int'l Bhd. of Boilermakers v. Local Lodge D504,
866 F.2d 641 (3d Cir. 1989) 24

Int'l Bhd. of Elec. Workers AFL-CIO v. Hechler,
481 U.S. 851 (1987) 15

Int'l Union of Operating Engineers, Local 150, AFL-CIO v. Flair Builders, Inc.,
406 U.S. 487 (1972) 5

Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Hoosier Cardinal Corp.,
383 U.S. 696 (1966) 27

John Wiley & Sons, Inc. v. Livingston,
376 U.S. 543 (1964) ..... passim

Klauder v. Cregar,
327 Pa. 1, 192 A. 667 (1937) 17

Kobell v. United Paperworkers Int'l Union,
965 F.2d 1401 (6th Cir. 1992) 20

TABLE OF AUTHORITIES
(continued)

PAGE

Litton Fin. Printing Div. v. N.L.R.B.,
501 U.S. 190 (1991) 1, 4

Mastro v. Potomac Elec. Power Co.,
447 F.3d 843 (D.C. Cir. 2006) 27

Meier v. Hamilton Electronic Systems, Inc.,
748 F. Supp. 296 (E.D. Pa. 1990) 24

Min Jin v. Metro. Life Ins. Co.,
310 F.3d 84 (2d Cir. 2002) 24

Paperworkers Local 620,
309 N.L.R.B. 44 (1992) 20

Prima Paint Corp. v. Flood & Conklin Mfg.,
388 U.S. 395 (1967) ..... passim

Scritti v. Miners Memorial Medical Center,
2001 U.S. Dist. LEXIS 10558
(M.D. Pa. July 24, 2001) 24

South Prairie Const. Co. v. Local No. 627, Int'l Union of Operating Engineers, AFL-CIO,
425 U.S. 800 (1976) 25

Teamsters Local 287, Int'l Bhd. of Teamsters v. N.L.R.B.,
293 Fed. Appx. 518 (9th Cir. 2008) 3

Teamsters Local 287, Int'l Bhd. of Teamsters,
347 N.L.R.B. 339 (2006) 3

TABLE OF AUTHORITIES
(continued)

PAGE

Textile Workers Union of Am. v. Lincoln Mills,
353 U.S. 448 (1957) 13, 19, 21, 26

Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Automobile Workers,
523 U.S. 653 (1998) 13, 14, 15, 16

United Food and Commercial Workers Union v. Fleming Foods East, Inc.,
105 F.Supp.2d 379 (D. N.J. 2000) 24

United Steelworkers of Am. v. Warrior & Gulf Nav. Co.,
363 U.S. 574 (1960) 8

United Steelworkers of Am., AFL-CIO-CLC v. Rawson,
495 U.S. 362 (1990) 15, 25

Vaca v. Sipes,
386 U.S. 171 (1967) 15, 26, 27

West Ohio Gas Co. v. Public Utilities Co.,
294 U.S. 63 (1935) 9

Wilkes Barre Publ'g Co. v. Newspaper Guild of Wilkes-Barre, Local 120,
647 F.2d 372 (3d Cir. 1981) 23, 25, 28

Wojciechowicz v. United States,
582 F.3d 57 (1st Cir. 2009) 27

TABLE OF AUTHORITIES
(continued)

PAGE

Young v. West Coast Ind. Relations Assoc'n,
144 F.R.D. 206 (D. Del. 1992) 24

STATUTES

9 U.S.C. §§ 1, *et seq*..... 2

9 U.S.C. §§ 1348(b), *et seq.* 27

29 U.S.C. § 158(b)(3) (N.L.R.A. § 8(b)(3)) 19, 20

29 U.S.C. § 185(a) (Section 301(a))..... passim

OTHER AUTHORITIES

Archibald Cox, *Some Aspects of the Labor Management Relations Act*, 1947,
61 Harv.L.Rev. 274 (1949) 17

Elkouri & Elkouri, *How Arbitration Works*,
(Alan Miles Ruben ed., 6th ed. 2003) 24

H.R. Rep. No. 80-245, at 3 (1947) 18

H.R. 3020, 80th Cong. § 101 (1947) 20

TABLE OF AUTHORITIES
(continued)

PAGE

John Danforth, *Tortious Interference With Contract: A Reassertion of Society's Interest in Commercial Stability and Contractual Integrity*, 81 Colum.L.Rev. 1491 (1981) 21

NLRB, Legislative History of the Labor-Management Relations Act, 1947 (1948) 18-20

Prosser & Keeton On Torts: Lawyer's Ed. § 130 at 1027 (W. Page Keeton, ed., 5th ed. 1984) 15

Restatement (Second) Of Torts Div. 9 Intro. Note (1977) 15

Restatement (Second) Of Torts § 766 (1977) 17

PETITIONER'S REPLY BRIEF

I. COURTS, NOT ARBITRATORS, HAVE THE AUTHORITY AND RESPONSIBILITY TO DETERMINE WHETHER A CONTRACT WAS FORMED.

A. Granite Rock's "Agreement" To Arbitrate Formation Cannot Be Implied.

The first question accepted by this Court explores contract formation – specifically, who determines what contract, if any, existed from July 2, 2004 to August 22, 2004. Local 287's "implied consent" theory (Local 10-12) fails because the test requires that Granite Rock "clearly and unmistakably" agree to arbitrate formation. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995); *Litton Fin. Printing Div. v. N.L.R.B.*, 501 U.S. 190, 208-9 (1991); *AT&T Technologies, Inc. v. Commc'n Workers of Am.*, 475 U.S. 643, 648-49 (1986); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-47 (1964). Granite Rock made no such agreement.

Local 287 argues that bringing this lawsuit "implied" an agreement to arbitrate formation. (Local 15-16.) Lacking Supreme Court support for its position, Local 287 relies principally on *Deloitte Noraudit A/S v. Deloitte Haskins & Sells*, 9 F.3d 1060, 1063-64 (2d Cir. 1993). *Deloitte* does not help Local 287 because: (1) it does not involve a collective

bargaining agreement; (2) the arbitration provision in *Deloitte* was far broader than that in this case;[1] and, (3) the plaintiff admittedly received actual benefits under the agreement on which it sued. *Deloitte*, 9 F.3d 1060, 1063-64. In sharp contrast, Granite Rock was denied the paramount benefit of its contract – adherence to the no-strike clause. Moreover, *Deloitte* is silent regarding the requirement that an agreement to arbitrate formation be "clear and unmistakable."

Local 287's reliance on *Wiley* and a series of FAA cases is equally unavailing.[2] (Local 15-17.) Not one of these supports Local 287's assertion that Petitioner must arbitrate formation.[3] Collectively, the FAA cases illustrate the application of equitable estoppel to prevent a party from simultaneously claiming a contract benefit and avoiding its burdens. This is precisely what Local 287 attempts to achieve.

Local 287 forced Granite Rock to sue because it denied the agreement existed on July 2 and

---

[1] Unlike the "arising under this Agreement" language in this case, *Deloitte* required arbitration of "any Dispute *or any other disagreement concerning this Agreement*." *Deloitte*, 9 F.3d 1060, 1063 (emph. added).

[2] In *Wiley*, both parties and the Court agreed whether a contractual obligation to arbitrate existed was for judicial determination. *Wiley*, 376 U.S. 543, 546-48. *Wiley* itself warned that it "cannot readily be assimilated to the category of those [cases] in which there is no contract" – which, according to Local 287, is precisely this case. *Id.* at 550.

[3] Although there is general consistency between FAA cases and Section 301 suits involving arbitration, Local 287 admits that, when FAA cases are inconsistent with Section 301(a), Section 301 precedent prevails. (Local 1, 12.)

unequivocally refused to arbitrate. Instead, Local 287 consented to the court's jurisdiction and agreed to a ruling on formation. (JA 113-17.) The court accepted jurisdiction and concluded that no contract was formed. (JA 203-11.) This "Judgment" was entered with Local 287's full approval. (JA 212-13.) Thirteen days later, Petitioner filed a new trial motion after an eyewitness came forward providing a sworn statement that ratification had occurred on July 2. (JA 214-16, 222-25.) Local 287 defended the "Judgment" while opposing Petitioner's motion. It objected to the court's formation determination *only after* it received the ruling granting Petitioner a new trial.[4]

Local 287 also claims that it "did not request the District Court to require an arbitrator to decide whether the parties' dispute was to be arbitrated" but rather, "requested the District Court to make

---

[4] In a separate proceeding, Region 32 of the National Labor Relations Board ("N.L.R.B.") refused to adopt Granite Rock's position that the tentative agreement was ratified on July 2. It issued an administrative complaint against Local 287 alleging it engaged in bad faith bargaining by postponing the ratification vote. When this complaint was litigated before an N.L.R.B. Administrative Law Judge, Granite Rock "made it crystal clear that it explicitly reserved the ratification issue for litigation in [federal] [c]ourt." (Dkt. 103, 8.) The N.L.R.B. proceeding focused on bad faith bargaining. *Id.* The July 2 ratification was not litigated. *Id.* Ultimately, Local 287 was found to have bargained in bad faith. *Teamsters Local 287, Int'l Bhd. of Teamsters*, 347 N.L.R.B. 339 (2006). The N.L.R.B. gave the contract, as finally executed, retroactive effect to July 2, 2004. *Id.* at 340. This decision was affirmed by the Ninth Circuit. *Teamsters Local 287, Int'l Bhd. of Teamsters v. N.L.R.B.*, 293 Fed. Appx. 518, 519-20 (9th Cir. 2008). By different routes, the N.L.R.B. and a unanimous jury both found the parties' contract effective on July 2. (JA 378-80.)

that decision." (Local 11.) This wordplay is disingenuous. First, it is inconsistent with the Ninth Circuit's decision that Respondent asks this Court to affirm. Second, it is at odds with Local 287's position before the Ninth Circuit that it was "willing, and sought, to have an arbitrator decide its formation challenge ...." (*See* Nin.Cir.Op.Br. 39.) Finally, Local 287's Rule 12(b)(6) motion undermines its current assertion because, if successful, it would have deprived the court of the opportunity to make the decision it now claims it requested. Local 287 misstates the objective of its motion to compel arbitration; it asked the District Court to delegate formation to an arbitrator. When one party denies a contract exists and neither party offers evidence of a "clear and unmistakable" agreement to submit formation to an arbitrator, the court must decide that issue according to *Wiley, Flair, AT&T, Litton, First Options, Howsam*, and *Green Tree.*

B. The July 2 Agreement Is Silent On Formation; Thus, There Is No "Clear And Unmistakable" Agreement To Arbitrate Formation And The Presumption Of Arbitrability Is Reversed.

The arbitration provision states "all disputes arising under this agreement" will be arbitrated and any decision by the arbitrator must be "within the scope and terms of this agreement." (JA 434-35.) As Petitioner's Brief explains, that language presupposes formation of a valid and binding agreement and narrows the universe of disputes to

those that "arise under the Agreement" once formed.[5] (Pet. Br. 23-24.)

Local 287 argues that because "the dispute about formation does not appear as an exception," it must be presumed to be within the scope of arbitration. (Local 29-31.) Unlike the meeting-payroll and recognition issues excluded from the arbitration provision, there was no need to exclude formation explicitly, because formation issues do not "arise under the agreement." (JA 436-37.)

Local 287's fall back argument echoes the Ninth Circuit and asserts that the arbitration clause is "certainly susceptible of an interpretation that covers the dispute ... and that is all that is necessary under the strong presumption of arbitrability." (Local 11-12, 28-29.) This Court has explicitly disagreed, repeatedly holding courts should not assume that the parties agreed to arbitrate

---

[5] In contrast, the arbitration provision at issue in *Flair Builders* included: "[a]ny difference, whatever it may be, not settled by the parties within 48 hours of occurrence." *Int'l Union of Operating Engineers, Local 150, AFL-CIO v. Flair Builders, Inc.*, 406 U.S. 487, 491 (1972). Similarly, *Buckeye* included: "[a]ny claim, dispute, or controversy ... arising from or relating to this Agreement ... or the validity, enforceability, or scope of this Arbitration Provision or the entire Agreement." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 442 (2006). Likewise, *Wiley* covered: "any differences, grievance, or dispute between the Employer and the Union arising out of or relating to this agreement, or its interpretation or application or enforcement." *Wiley*, 376 U.S. 543, 553. Finally, *Prima Paint* included: "[a]ny controversy or claim arising out of or relating to this agreement, or the breach thereof." *Prima Paint Corp. v. Flood & Conklin Mfg.*, 388 U.S. 395, 398 (1967).

arbitrability without "clear and unmistakable" evidence. As this Court explained in *First Options*:

> [T]he law treats silence or ambiguity about the question '*who* (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question '*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement' -- for in respect to this latter question *the law reverses the presumption.*

514 U.S. 938, 944-45 (emph. added).

C. Neither *Prima Paint* Nor *Buckeye* Requires Arbitration Of Formation Disputes.

Neither *Prima Paint* nor *Buckeye* restricts courts' authority to determine whether a contract was formed. (*See* Pet. Br. 25-27; Chamber Am. Br. ("Chamber") 6-19.) It is only by contending that the dispute is about something other than the July 2 formation issue or by relying on an impermissible "implicit agreement" that Local 287 can attempt to rely on those cases.

Local 287 misconstrues the judiciary's responsibility to determine whether a contract exists as required by this Court's precedent. There is no "conundrum" about this issue. *AT&T* cautions courts against ruling on the underlying claim's potential merits when deciding whether the parties have agreed to submit a particular grievance to arbitration. (Local 22, 24.) However, Local 287's

argument that a judicial determination of formation vitiates *AT&T's* holding is wrong. *Id.* Resolution of formation is not the equivalent of deciding the underlying dispute's merits.[6] *AT&T*, 475 U.S. 643, 651.

Local 287's assertion that the Ninth Circuit made the "gateway" ruling required by *AT&T* and its progeny is incorrect. (Local 22.) Rather, the Ninth Circuit vacated the unanimous jury verdict on formation and ordered the parties to arbitrate – erroneously placing that issue with an arbitrator. In doing so, the Ninth Circuit and Local 287 collapsed two distinct lines of Supreme Court precedent (*see* Pet. Br. 25-27; Chamber 6-19) and ignored the carve out language of *Buckeye*.[7]

D. Local 287 Understates The Adverse Consequences That The Decision Below Will Have On Industrial Peace.

According to the Ninth Circuit, the existence of an undisputed arbitration provision in the tentative agreement was the "only critical fact" needed to justify submitting the entire dispute to arbitration. (JA 46-47.) Like a warning beacon, the decision below cautions against finalizing an arbitration clause before ratifying a labor contract. That works against the national labor policy favoring arbitration. The prospect of enforcing a

---

[6] The questions on the merits in the underlying dispute are: (1) was the no-strike clause of the July 2 Agreement breached; and (2) if so, what are the damages. The jurisdictional question before the jury was whether a contract was formed on July 2. These questions are not synonymous.

[7] *Buckeye*, 546 U.S. at 444 n.1. (Pet. Br. 25-27.)

tentative agreement on arbitration promises to discourage employers and unions from including any arbitration provision in their agreements.

Local 287 dismisses Petitioner's argument concerning the threat to industrial peace as "hard to follow." (Local 25.) It is not, however, difficult to understand the inherent inequity in enforcing the arbitration provision against Granite Rock while refusing to give the no-strike clause contemporaneous effect. One is *quid pro quo* for the other. *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 n. 4 (1960).

Finally, Local 287's assertion that Granite Rock did not seek a remedy from an arbitrator regarding the alleged breach of the no-strike clause is surprising. (Local 25.) Granite Rock failed to obtain injunctive relief and submission of the underlying dispute to arbitration because the Court initially held that formation had not occurred.

E. Local 287's Newly Asserted Theory Regarding The Sham August 22 "Ratification" Is Untimely And Fails To Demonstrate Petitioner's Consent.

On August 22, while this litigation was pending and while Local 287 continued to deny the July 2 Agreement's formation, Local 287 unilaterally held what it called a "ratification vote." (Local 4.) For the first time since litigation began five years ago, Local 287 now asserts formation occurred on August 22 and that this unilateral proclamation provides an alternative basis for establishing Granite Rock's implied consent to arbitrate the July 2 formation issue. (Local 11, 26-27.)

Local 287 has known about the August 22 event since it occurred and properly refrained from any argument that it usurped the federal court's authority to decide formation. The newly advanced argument (premised upon the August 22 "shadow agreement") should not be considered because it was never properly raised in either court below, or in its opposition to certiorari. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 114 (1986); *West Ohio Gas Co. v. Public Utilities Co.*, 294 U.S. 63, 76-77 (1935).

The orchestrated ratification did not require Granite Rock to dismiss its lawsuit.[8] It is undisputed that there was no bargaining after July 2 nor was there substantive discussion about the proposed contract on August 22 among the union members. Thus, the contract allegedly "ratified" on August 22 was identical to the agreement that had been ratified on July 2. Had the collective bargaining agreement not been ratified on July 2, Petitioner would have made proposals reflecting the economic effect of renewed picketing and changed conditions. However, Petitioner was certain that the contract had been approved and, consistent with that position, it made no additional proposals.

---

[8] As reflected in the July 2 Agreement and the "shadow agreement," the contract term is from May 1, 2004 to April 30, 2008. (JA 394, 448.) Generally, and in this case, matching the starting date with the former contract's expiration allows for benefit continuity. Local 287 never has argued that the arbitration language dates back to May because it could not do so without acknowledging that the no-strike language also existed. All parties agree that the no-strike clause became effective at formation. Thus, the critical event and relevant date is when the contract was formed – which is for the court. *Wiley*, 376 U.S. 543, 546-47; *AT&T*, 475 U.S. 643, 648-49.

Indeed, the document the parties signed in December 2004 was entirely based on the July 2 "Last, Best and Final Offer." (JA 397-448.) Common sense dictates that Local 287 cannot manufacture Petitioner's "consent" to arbitrate formation by unilaterally staging a vote on August 22, while litigation is pending regarding the July 2 formation, and after both parties consented to the court's jurisdiction to resolve that issue.[9]

Local 287's newly asserted theory based on the sham ratification also fails because: (1) the ratification should be seen for what it is – a tactical strategy designed to benefit Respondent's position before the district court and the NLRB; (2) Local 287 should be equitably estopped from changing its position, yet again; (3) the August 22 "ratification" does not resolve the critical formation dispute over whether a contract was formed on July 2; (4) neither the July 2 Agreement nor the August 22 "shadow agreement" includes "clear and unmistakable" language demonstrating the parties agreed to

---

[9] *Amicus* AFL-CIO ignores the Ninth Circuit's reasoning, the prior positions of Local 287, and the question accepted by this Court for review regarding formation. AFL-CIO's only argument hinges on the August 22 "ratification." It wrongly accuses Petitioner of being "deceptive" when it argues no contract existed. (AFL-CIO 14.) This case's facts and allegations have been transparent throughout the litigation. The July 2 Agreement, according to Local 287, never has been ratified. The "shadow agreement" of August 22 has not been accepted by Petitioner, except as part of the July 2 Agreement. Thus, Local 287 consistently has claimed no Agreement was formed or in effect during the relevant period (July 2 through August 22). Furthermore, Petitioner never has "clearly and unmistakably" consented to arbitrate formation of the July 2 Agreement much less the alleged August 22 formation.

arbitrate formation; and (5) Respondent has not explained how an arbitrator, given authority based only on the August 22 "shadow agreement," could determine whether a contract was formed on July 2. *AT&T,* 475 U.S. 643, 648-49.

The August 22 theory is also contrary to public policy because it discourages employers from accepting the return of striking workers. If Local 287 had the power to forum shop by claiming formation of a new contract on August 22, Petitioner would need to reject any contract unless Local 287 acknowledged formation on July 2. That impedes rather than fosters industrial peace. Petitioner allowed Local 287 to end its dispute and permitted employees to return to work without forcing the Local to agree that formation occurred on July 2 because the parties were litigating that exact question in court. Public policy and common sense encourage ending labor disputes as soon as possible and leaving the formation question to the court.[10]

---

[10] It remains Petitioner's contention that the critical agreement was formed on July 2, which IBT subsequently disapproved. Petitioner, of course, rejects the newly asserted "August 22 theory," but IBT may also wish to address this issue. Granite Rock's complaint alleges that Rome Aloise, IBT's representative, stated "he had the authority of ... IBT to settle the unlawful strike." (JA 314.) It further alleges that the August 22 ratification was authorized by IBT. (JA 313.) If a second contract was formed on August 22 (which Granite Rock denies), the Complaint alleges that Local 287 acted under the authority and on behalf of IBT. Thus, IBT would be bound to the "shadow agreement" by virtue of its agency status and be a party for purposes of liability and damages if the contract became operative on July 2.

II. GRANITE ROCK'S SUIT AGAINST IBT IS COGNIZABLE UNDER SECTION 301(a) BECAUSE IT IS CONSISTENT WITH THE STATUTE'S PLAIN LANGUAGE AND ITS PURPOSE TO ENFORCE LABOR CONTRACTS.

A. Federal Courts Have Authority To Fashion A Remedy For Conduct Causing A Contract Violation; Section 301(a)'s Plain Language Bestows Jurisdiction And Congressional Intent Requires A Remedy.

IBT argues that Granite Rock may only enforce its contract with one type of claim – breach of contract against a defendant with duties under the contract.[11] It argues that Section 301(a)'s plain

---

[11] IBT asserts that Granite Rock abandoned its contract breach claim premised on agency (IBT 13) as well as its inducement claim, and thus, this Court improvidently granted certiorari. (IBT 16.) These contradictory contentions attempt to bypass the critical policy questions before the Court. Petitioner has consistently asserted a focused claim against IBT premised on inducement/interference and described it below as an action grounded in contract law but including, as necessary, inducement concepts. (Nin.Cir.Rep.Br. 57 (identifying the claim as a "federal common law 'hybrid' action"); Nin.Cir.Op.Br. 26, 31 n. 10, 64-65.) Although Petitioner withdrew its claim that IBT acted as Local 287's undisclosed principal for purposes of ratifying and thereby forming the July 2 contract (Dkt. 178, 8:6-9), Petitioner never abandoned its allegations that by directing Local 287 and its members to strike, Local 287 acted as IBT's agent for purposes of the contract breach. (JA 306.) Petitioner, moreover, alleged that IBT displaced Local 287 by directing it to strike and to deny ratification. (JA 311-15, 318.) Granite Rock expressly stated it had "not abandoned its agency legal theory, but may raise the

language "[d]emonstrates that it is limited to claims for breach of contract," but foregoes an analysis of the statute's text. (IBT 17.) The statute expressly embraces "[s]uits for violations of contracts" and requires that the contracts be "between an employer and a labor organization ...."[12] If an action falls within this broad jurisdictional grant, federal courts are given the responsibility to fashion a body of federal law to enforce labor contracts. *See Textile Workers Union of Am. v. Lincoln Mills*, 353 U.S. 448, 450-51 (1957). This authority is not limited to traditional breach of contract claims, but draws upon all common law necessary for contract enforcement. *Id.* at 457.

IBT attempts to support its theory by referring to one sentence in *Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Automobile Workers*, 523 U.S. 653, 657 (1998), stating that Section 301 requires a "'claim [that] a contract has been violated.'" (IBT 18.) IBT then posits that the "common understanding" of Section 301(a)'s phrase "for violation of contracts" is "a suit directed at a defendant to remedy an alleged breach of *its contractual obligation*." (*Id.*) (emph. in original). With *no citation to authority* beyond the Ninth Circuit's decision, IBT concludes that "a suit

---

issue again should discovery show the factual basis needed." (Dkt. 178, 6:23-24.) To the extent this Court holds agency or alter ego theories could apply to post-July 2 conduct, Petitioner submits its Third Amended Complaint sets forth sufficient facts to support a "plausible" claim for relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). *See also Crull v. GEM Ins. Co.*, 58 F.3d 1386, 1391 (9th Cir. 1995).

[12] For a detailed analysis of Section 301(a)'s language, see Petitioner's Brief 33-34.

against a non-party, that owes no duty created by the contract, is not a suit 'for violation of contract[ ].'" (*Id.*)

Nothing in Section 301(a) or this Court's decisions, including *Textron,* support that linguistic leap. The parties in *Textron* disputed whether federal courts retain Section 301(a) jurisdiction over declaratory actions in which one party alleged the other had fraudulently induced its agreement. The union argued the word "for" within "suits for violation of contracts" broadly permits jurisdiction over any claim that *concerns* a labor contract breach. 523 U.S. 653, 657. The Court rejected that interpretation, holding that jurisdiction exists only over Section 301(a) claims filed "*because a contract has been violated.*" *Id.* at 657 (emph. in original). The Court did *not* hold the only proper Section 301(a) claim is one for contract breach. Likewise, the Court did *not* hold the only proper defendant is a signatory or someone with contractual rights or duties.[13]

In contrast to the union in *Textron*, Granite Rock filed suit against IBT *because its labor contract rights were violated* in a costly, Company-wide strike caused by IBT. (JA 311-14.) This Court extends Section 301(a) jurisdiction over claims

---

[13] IBT states that in *Textron*, "[t]he Court was not suggesting ... that Section 301(a) extends beyond the enforcement of contractual rights and duties." (IBT 19 n. 14.) Granite Rock, however, has not suggested that Section 301(a) jurisdiction extend beyond enforcing such rights and duties. Indeed, Granite Rock's claim against IBT is *intended* to provide for the "enforcement of contractual rights and duties," *i.e.*, enforcement of its contract's no-strike rights.

beyond contract breach claims when necessary to enforce contractual rights.[14] In *Int'l Bhd. of Elec. Workers AFL-CIO v. Hechler*, 481 U.S. 851, 863-65 (1987), this Court held that federal courts have jurisdiction over a union member's state-law tortious breach of contract claim.[15] In *Vaca v. Sipes*, 386 U.S. 171, 188-89 (1967), this Court recognized claims for a union's breach of its duty of fair representation. The elements to prove that a union breached that duty require the aggrieved employee to prove that the union's conduct was "arbitrary, discriminatory, or in bad faith," and are obviously not premised on contract principles. *Id.* at 190.

IBT attempts to defeat the proposed action by profiling it as a "tort" and discounting that inducement/interference exists as an essential legal

---

[14] IBT suggests the Restatement (Second) of Tort's omission of a chapter devoted to labor disputes supports its assertion that such claims are disallowed under Section 301(a). (*See* IBT 39 (quoting RESTATEMENT (SECOND) OF TORTS Div. 9 Intro. Note (1977); PROSSER & KEETON ON TORTS: Lawyer's Ed. § 130 at 1027 (W. Page Keeton, ed., 5th ed. 1984).) The omission of this chapter, however, is hardly surprising given Section 301's preemptive effect on state-law tort claims.

[15] Realizing that *Hechler* evidences this Court's recognition under Section 301(a) of a tort claim, IBT asserts that *Hechler* was abrogated by this Court's decisions in *United Steelworkers of Am., AFL-CIO-CLC v. Rawson*, 495 U.S. 362 (1990) and *Textron*, and that, in *Hechler*, the Court held only that the plaintiff's tort claim was preempted by Section 301. (IBT 33-34.) *Textron* did not limit Section 301(a) suits to breach of contract claims. In *Hechler*, this Court determined that the plaintiff's state tort claim was preempted, but could be advanced as a duty of fair representation claim or a Section 301(a) action. The case was remanded to determine the appropriate limitations period. *Hechler*, 481 U.S. 851, 865. This Court reaffirmed *Hechler*. *Rawson*, 495 U.S. 362, 374.

concept for enforcing contracts. This Court, however, has applied Section 301 in preemption cases "[w]hether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985). IBT accepts that Section 301(a) preempts any claim for labor contract violations, including a state law inducement claim, but insists the Court preclude Section 301 remedies unless the action is ensconced solely in "contract law." To limit Section 301 liability exclusively to contract breach claims, but broadly preempt all actions alleging labor contract violations, immunizes blatant misconduct, impairs the statute's effectiveness, improperly "elevate[s] form over substance," and is fundamentally unfair. *Id.* at 211.

Section 301(a) indisputably provides jurisdiction over claims, like Granite Rock's claim, that have been filed "*because a contract has been violated*" and the contract in question is "between" an employer and a labor organization. *Textron*, 523 U.S. 653, 657 (emph. in original). Once the "plain language" requirements are established, it is whether the action fulfills Congress' mandate to enforce labor contracts, not the artificial label attached to the action, that is determinative.

B. IBT Cannot Escape Liability For Displacing Its Local And Directly Inducing A Company-Wide Strike Merely Because Its Duty To Honor The No-Strike Clause Was Not Expressly Stated In The Contract.

IBT asserts that Section 301(a) claims only may be alleged against entities with duties

expressed in the labor contract. Section 301(a)'s plain language, intent, and this Court's precedent do not support such a limitation and do not excuse IBT's intentional violation of Petitioner's contract rights.

Section 301(a) protects Granite Rock's right to the no-strike clause's benefits, thereby promoting labor peace and the nation's economic interests. Since inception, inducement/interference actions were intended to provide remedies when "[o]ne who, having knowledge of an existing valid contract between others, intentionally, knowingly, and without reasonable justification or excuse, induces one of the parties to the contract to breach it to the damage of the other party." *Klauder v. Cregar*, 327 Pa. 1, 8, 192 A. 667, 671 (1937); *see also* RESTATEMENT (SECOND) OF TORTS, § 766 (1977). IBT should not be permitted to shirk its duty to respect another's contract simply because Granite Rock's contract did not explicitly name IBT.

IBT cites an article written by Archibald Cox in support of its assertion that Granite Rock may only allege a claim against an international union that has an explicit no-strike duty. (IBT 12-13.) (citing Archibald Cox, *Some Aspects of the Labor Management Relations Act*, 1947, 61 Harv.L.Rev. 274, 311-12 (1949).) Professor Cox, however, recognized an international that "promise[s]" to abide by a no-strike clause should be liable for strikes violating such a clause when it engages in the strike for its own benefit and displaces a local union. Cox, *supra*, at 311-12. Granite Rock submits that when IBT caused Local 287 and its members to strike, IBT, by displacing Local 287, assumed the

Local's role under the contract, and consequently, assumed a duty to abide by the contract's terms, including the no-strike clause. *Cf., Wiley*, 376 U.S. 543, 550-51; *Brown v. Sandimo Materials*, 250 F.3d 120, 127 (2d Cir. 2001). Whether this "promise" derives from a general duty to respect contracts (common law inducement) or from IBT's displacement of and control over Local 287 in causing the breach, it is consistent with Congress' intent that Section 301(a) provide remedies necessary to enforce labor contracts.[16]

IBT induced a Company-wide strike in order to extort Petitioner into signing a hold harmless agreement – a "contract" between an employer and a labor union that would have immunized IBT from liability associated with its strike activities. IBT should not be rewarded with judicial immunity because it failed to obtain the contract it sought.

C. Congress Provided Federal Courts Authority To Enforce Existing Labor Contracts For The Benefit Of The Public, The Economy, And The Parties.

Congress enacted the Labor Management Relations Act ("L.M.R.A.") to address "the effects of industrial strife [that] have, at times, brought our country to the brink of economic paralysis." H.R. Rep. No. 80-245, at 3 (1947), 1 Leg. Hist. at 292, 294. Section 301(a) of the L.M.R.A. addressed this problem. IBT acknowledges Congress intended that

---

[16] If it is necessary to draw upon agency, single-employer, alter ego, joint venture, or successor theories to provide a remedy, Granite Rock's complaint alleges facts sufficient to support application of such theories.

Section 301(a) provide courts with jurisdiction over claims to *enforce* labor contracts, but asserts that Congress intended to limit enforcement only to defendants with express duties in the contract.[17] Nothing in the plain language or legislative history of the L.M.R.A. indicates Congress intended to place that limitation on Section 301(a) suits. The opposite is true – Congress enacted Section 301(a) to enable federal courts to protect the public, the economy, and the parties by enforcing agreed-upon labor contracts. *Lincoln Mills*, 353 U.S. 448, 452 (quoting H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., at 42 (June 3, 1947) ("'Once parties have made a collective bargaining contract *the enforcement of that contract should be left to the usual processes of law and not to the National Labor Relations Board.*'")) (emph. added).

IBT confuses the N.L.R.B.'s and courts' roles. Respondent admits Granite Rock had no recourse against it in N.L.R.B. proceedings, but claims that because Congress failed to recognize an administrative unfair labor practice under Section 8(b)(3) of the National Labor Relations Act ("N.L.R.A.") that might have addressed IBT's misconduct, Congress did not provide any remedy for Granite Rock.[18] (IBT 24-25.) IBT's argument

---

[17] IBT quotes legislative history excerpts, but takes these excerpts out of context. Regarding Senator Ball's quote, IBT ignores that the debate in which he participated concerned the ability to sue union members, not internationals that directly cause strikes. (IBT 23.) Likewise, conference committee reports do not necessarily address every substantive difference between the final bill and its earlier versions. (*See* IBT 27.)

[18] IBT abandoned its prior argument that Granite Rock could pursue a remedy against it by filing an N.L.R.B. charge, but,

ignores that by enacting Section 301(a), Congress intended that courts, not the N.L.R.B., principally enforce agreed-upon labor contracts.

There is an obvious reason why Congress eliminated the relevant language of the House's Section 8(b)(3) version. This Section addresses parties' conduct during the *negotiation* of labor contracts.[19] Because strikes are unions' primary weapon during ongoing labor negotiations, it is not surprising that Congress declined to provide remedies against international unions that cause strike activity *before* a contract has been reached.

---

relying on the same two cases IBT cited to the Ninth Circuit, AFL-CIO asserts that an N.L.R.B. remedy exists. (*See* AFL-CIO. Br. at 31 (citing *Paperworkers Local 620*, 309 N.L.R.B. 44 (1992), *Kobell v. United Paperworkers Int'l Union*, 965 F.2d 1401, 1407 (6th Cir. 1992)); (IBT Ans. Br. 33 n. 33.) Neither case supports AFL-CIO's position. Section 8(b)(3) bad faith bargaining charges may be alleged against exclusive bargaining representatives. 29 U.S.C. § 158(b)(3). In both *Paperworkers Local 620* and *Kobell*, the internationals were employees' bargaining representative and contract signatories. No Section 8(b)(3) remedy exists against non-signatory internationals, like IBT, who are not acting as the exclusive bargaining representative.

[19] The House version of the bill IBT cites as the basis for its position contemplates strikes occurring in the context of ongoing labor contract negotiations. H.R. 3020, 80th Cong. § 101 (1947), 1 Leg. Hist. at 769-83. This proposed unfair labor practice would apply to IBT's involvement in a strike *before* a contract was reached. But, once the parties agree to a contract, its primary enforcement shifts to courts. Because Section 8(b)(3) is limited to the employees' exclusive bargaining representative, the N.L.R.B. is without jurisdiction to remedy IBT's misconduct. No such limitation exists under Section 301(a).

Congress decided that the N.L.R.B. should have authority to regulate *pre-contract* activities and that federal courts should perform the critical role of enforcing agreed-upon contracts. *Lincoln Mills*, 353 U.S. 448, 452. Consistent with that responsibility, Congress intended that courts remedy an international's inducement of a company-wide strike.[20] Providing a remedy for such misconduct is necessary to fulfill "society's interest in contractual integrity and thus augments the extent to which existing contracts will appear reliable and will tend to structure a market economy." John Danforth, *Tortious Interference With Contract: A Reassertion of Society's Interest in Commercial Stability and Contractual Integrity*, 81 Colum.L.Rev. 1491, 1511 (1981) (citation omitted).

---

[20] IBT asserts that Granite Rock's discussion of Congress' intent to incorporate California inducement/interference actions as set forth in *Imperial Ice Co. v. Rossier*, 18 Cal.2d 33, 35 (1941), in Section 301(a), is misguided because that case described an exception for labor strikes. However, that exception only applied to strikes that "improve[d] working conditions ... of sufficient social importance to justify" the interference – not when unions strike to gain benefits for themselves. *Id.* at 34.

D. IBT's Parade Of Horribles Is Contradicted By Common Sense, Experience, And The Action's Narrow Application.

1. Granite Rock's Proposed Action Will Not Cause Parties To Avoid Arbitrating Their Disputes Nor Will It Unduly Increase Federal Courts' Dockets.

Granite Rock's claim is narrowly defined and requests only the same remedies that would be available against Local 287.[21] It requires that the non-party have knowledge of the contract, and, for

---

[21] IBT reports that, in the Ninth Circuit, Granite Rock requested punitive damages against IBT, thus implying that Petitioner abandoned its inducement/interference claim by now claiming only contract damages. Given the nature of its claim, Petitioner consistently has requested that contractual damages be awarded for IBT's misconduct; however, it also invited punitive damages should the Ninth Circuit determine they were appropriate. (Nin.Cir.Op.Br. 68; Nin.Cir.Rep.Br. 30.) IBT correctly states that Granite Rock previously argued that punitive damages may be appropriate for IBT's malicious misconduct. Petitioner hereby withdraws that suggestion, and requests the same damages as would be awarded against Local 287. This request is consistent with its displacement analysis, and further addresses IBT's concern that recognition of Petitioner's proposed action encourages unnecessary litigation. When determining remedies for tort/contract actions, courts have not hesitated to limit them to contractual damages. *See, e.g., Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 696 (1988) ("the employment relationship is fundamentally contractual," and that "contractual remedies should remain the sole available relief" for breach of the implied covenant of good faith and fair dealing claims against employers even though such claims contain both tort and contract elements).

its own gain, displace a signatory party and directly induce a contract violation. This eliminates the possibility that IBT's hypothetical bank, which, without knowledge of a labor contract, denies a loan to an employer, will be subject to liability. (IBT 48.) Similarly, a non-signatory union that supports workers striking in violation of the signatory's no-strike clause, would have no liability under Section 301(a), provided that union did not directly cause the workers to violate the contract. Further relief would be limited to contract damages or injunctive relief, providing little incentive to make such claims when the signatory party is sufficiently solvent. The "flood" of litigation IBT speculates might occur is improbable given the narrowness of the proposed action.[22]

As illustrated by the Third Circuit's actual experience, Section 301 inducement/interference actions will not create massive litigation. In the decades since *Wilkes Barre Publ'g Co. v. Newspaper Guild of Wilkes-Barre, Local 120*, 647 F.2d 372 (3d Cir. 1981), recognized traditional interference claims against non-signatories under Section 301(a), federal courts have not been barraged by these claims. Indeed, Third Circuit plaintiffs have alleged them very infrequently even though traditional interference claims are broader than Petitioner's tailored claim for contract damages.[23]

---

[22] A "flood" of litigation also is unlikely because employers typically will seek injunctive relief when unions induce strikes that violate no-strike clauses. (Pet. Br. 58 n.32.)

[23] Tortious interference claims appear to have been alleged against non-signatories in approximately nine reported circuit cases. *Biedelman v. Stroh Brewing Co.*, 182 F.3d 225 (3d Cir.

IBT's speculation that employees will file inducement/interference claims against supervisors and parent companies, requiring federal courts to litigate routine wrongful discharge cases, is fanciful. With respect to claims against supervisors, employees cannot escape arbitration of their discharge claim by filing an inducement/interference action because supervisors are agents of their employers in personnel actions. *See, e.g., Burlington Indus. v. Ellerth*, 524 U.S. 742, 756 (1998); *Min Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 94 (2d Cir. 2002). A discharge claim subject to an arbitration provision will likely be arbitrated because of that agency status. Elkouri & Elkouri, HOW ARBITRATION WORKS, 547-52 (Alan Miles Ruben ed., 6th ed. 2003).

Likewise, little possibility exists that employees will file inducement/interference claims against non-party parent companies. The employee must have some good faith basis to allege that a parent company, for its own benefit, displaced and induced its subsidiary to violate a contract's just

---

1999); *Int'l Bhd. of Boilermakers v. Local Lodge D504*, 866 F.2d 641 (3d Cir. 1989); *Seritti v. Miners Memorial Medical Center*, 2001 U.S. Dist. LEXIS 10558 (M.D. Pa. July 24, 2001); *United Food and Commercial Workers Union v. Fleming Foods East, Inc.*, 105 F.Supp.2d 379 (D. N.J. 2000); *Farmland Dairies v. Milk Drivers & Dairy Employees Union*, 1997 U.S. Dist. LEXIS 7813 (D.N.J. Feb. 11, 1997); *Int'l Assoc'n of Heath and Frost Insulators v. Absolute Environmental Service, Inc.*, 814 F. Supp. 392 (D. Del. 1993); *Young v. West Coast Ind. Relations Assoc'n*, 144 F.R.D. 206 (D. Del. 1992); *Meier v. Hamilton Electronic Systems, Inc.*, 748 F. Supp. 296 (E.D.Pa. 1990); *Cole v. Pathmark of Fairlawn*, 672 F. Supp. 796 (D.N.J. 1987).

cause provision.[24] Few, if any, circumstances would justify such claims and little incentive would exist to make them. Notably, it appears that none have been reported in the Third Circuit since *Wilkes-Barre*. As the dearth of Third Circuit cases suggests, recognizing Granite Rock's proposed claim will not "subject a wide-range of non-party defendants to suits by employees, unions, employers and others." (IBT 47.)

2. Granite Rock's Proposed Action Does Not Usurp Either Labor Arbitrators' Or The N.L.R.B.'s Respective Roles.

Federal courts have, through Section 301(a) and other provisions of the L.M.R.A., always shared with the N.L.R.B. and arbitrators the responsibility to enforce national labor policy and interpret labor contracts. This Court has not hesitated to construe collective bargaining agreements when necessary to fulfill the statute's purpose. In *Rawson*, this Court considered whether a union had, under its contract, an affirmative duty to conduct mine inspections so that the plaintiffs could proceed with their fraud and negligence claims against the union for failing to perform that duty. 495 U.S. 362, 374-75. Courts, moreover, routinely analyze labor contract provisions to resolve duty of fair representation

---

[24] The law regarding a parent company's responsibility for its subsidiary's actions is far more developed than any similar doctrine between an international and its locals. *South Prairie Const. Co. v. Local No. 627, Int'l Union of Operating Engineers, AFL-CIO*, 425 U.S. 800, 802 n.3 (1976). It is likely that a court would apply the single-employer or alter ego doctrine rather than Granite Rock's claim.

claims filed concurrently with contract breach claims. *See Vaca*, 386 U.S. 171, 193-94. This Court has held that federal courts may exercise jurisdiction and authority under Section 301(a) over claims that also could be pursued before the N.L.R.B. *Id.* at 180-81.

3. Federal Courts Are Well-Equipped To Decide The Action Alleged By Granite Rock.

IBT contends that "[t]he task of creating a federal common law of tortious interference will be extremely complex and burdensome," and that courts will have problems applying state-specific inducement/interference standards. (IBT 42.) But, IBT ignores that Section 301(a) authorizes courts to develop *uniform* federal common law. *Lincoln Mills*, 353 U.S. 448, 450-51. Federal courts need not apply individual state standards for these claims. By adopting Petitioner's proposed claim, or a variation thereof, this Court will provide courts with authority to enforce a uniform inducement/interference claim primarily drawn from contract law.

The narrowness of Petitioner's proposed claim further negates IBT's argument. Petitioner's claim includes four essential elements: (1) knowledge of the existing employer-union labor agreement; (2) violation of the agreement; (3) displacement of the union or employer so that the non-signatory party takes control of the union or employer causing or inducing the violation; and (4) damages from the violation. If there is concern that this action could reach a non-signatory that merely supports the objectives of a local union or subsidiary employer, as IBT argues, the moving party could be required to

show that the non-signatory caused the contract violation to procure a benefit for itself, and that "but for" the non-signatory's actions, the breach would not have occurred. (Pet. Br. 37 n. 12.) Contrary to IBT's assertions, courts will not be required to engage in broad inquiries regarding what constitutes "improper" interference, and, except for determining whether the defendant acted for its own gain, the defendant's motive.

Federal courts are well equipped to decide issues that arise in these claims. For example, they have expertise in developing and applying appropriate statutes of limitations to Section 301(a) cases and deciding tort-like claims in the context of labor disputes, and, when exercising supplemental jurisdiction over state-law tort claims joined with Federal Tort Claim Act claims. *See, e.g., DelCostello v. Int'l Bhd. of Teamsters, et al.*, 462 U.S. 151, 165 (1983); *Vaca*, 386 U.S. 171, 182-83; *Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Hoosier Cardinal Corp.*, 383 U.S. 696, 707-08 (1966); *Wojciechowicz v. United States*, 582 F.3d 57 (1st Cir. 2009); *Chapa v. United States*, 497 F.3d 883 (8th Cir. 2007); *Mastro v. Potomac Elec. Power Co.*, 447 F.3d 843 (D.C. Cir. 2006); *Binz v. Brandt Construction Co., Inc.*, 301 F.3d 529 (7th Cir. 2002).

4. Granite Rock's Proposed Claim Will Not Result In Complex Procedural Problems.

IBT posits that litigating the facts involved in an inducement/interference claim in two different fora, federal court and arbitration, will present complicated procedural issues. Although Petitioner

agrees that its proposed action against IBT is not subject to the grievance and arbitration clause in its contract with Local 287 (as would be the case with any non-signatory), nothing prevents a court from staying the action against IBT until an arbitrator has resolved the claim against Local 287, including the amount of damages.[25] Indeed, after the arbitrator's determination, there may be no need for further litigation, but, given the additional elements of the proposed inducement/interference claim, separate litigation concerning IBT's actions may be necessary and appropriate.

E. The Ninth Circuit's Decision Leaves Granite Rock Without A Remedy And Provides A Blueprint For International Unions To Demand Concessions From Employers Despite Their Locals' No-Strike Obligations.

Granite Rock alleges IBT inflicted multi-million dollar harm on Petitioner's business, employees, and families. Prior to the Ninth Circuit ruling, it appears such lawlessness by internationals was rare. Now that the Ninth Circuit's decision provides a blueprint, this misconduct is indisputably lawful subject to this Court's decision. This roadmap and immunity licenses internationals to take aggressive roles in their locals' post-contract formation activity.

IBT argues Granite Rock may obtain relief by pursuing a contractual remedy and by filing an

---

[25] In *Wilkes-Barre*, the Third Circuit instructed the district court to stay the claim against the international during the arbitration between the signatory parties. 647 F.2d 372, 383.

unfair labor practice charge against Local 287, despite IBT's blatant misconduct. Although Local 287 should be held liable for its role in violating the contract, the law should not make the Local solely liable for IBT's intentional misconduct. IBT ignores also that local unions, like Local 287, lack the financial means to satisfy a judgment for losses caused by a debilitating, company-wide strike. *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 423 n. 10 (1981) (Powell, J., concurring) ("The possibility that the local will be liable may be of little practical benefit, however, because the local is often judgment proof."). IBT's "immunizing" theory would leave employers without any remedy against an international even when the local has no assets or, as in this case, has assets encumbered by a loan from the international. (JA-315.)

Congress did not intend to leave employers at the mercy of self-serving internationals' misconduct. Instead, it enacted Section 301(a) to give courts the authority to enforce labor contracts consistent with national labor policy. It is inconceivable that Congress created federal law preempting state actions, but left employers without remedies for internationals that cause and control company-wide strikes and thereby directly induce a no-strike clause violation. If any legislative action to change Section 301 is necessary, it should be sought by IBT, not Granite Rock. Petitioner's action is consistent with the statute's plain language and Congressional intent, and will effectively prevent the trampling of an innocent party's contractual rights.

III. CONCLUSION

For the foregoing reasons, and as described in the Petitioner's Brief, the Ninth Circuit's decision should be reversed.

Respectfully Submitted,

Garry G. Mathiason
Counsel of Record
Alan S. Levins
Adam J. Peters
Rachelle L. Wills
Sofija Anderson
LITTLER MENDELSON
A Professional Corporation
650 California Street, 20th Floor
San Francisco, CA 94108.2693
Telephone: 415.433.1940

Arthur R. Miller
Of Counsel
New York University School of Law
40 Washington Square South
Vanderbilt Hall 409D
New York, NY 10012
Telephone: 212.992.8147

AMICUS CURIAE BRIEF

No. 08-1214

IN THE
Supreme Court of the United States

GRANITE ROCK COMPANY,
Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS & TEAMSTERS LOCAL 287,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

LYNN K. RHINEHART
JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337

Of Counsel:

LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

STATEMENT 2

I. THE UNDERLYING LABOR DISPUTE 3

II. THE UNFAIR LABOR PRACTICE CASE 5

III. THE INSTANT LMRA § 301 LAWSUIT 6

SUMMARY OF ARGUMENT 9

ARGUMENT 11

I. GRANITE ROCK WAS PROPERLY OREDERED TO ARBITRATE ITS BREACH OF CONTRACT CLAIM AGAINST LOCAL 287 11

II. LMRA § 301 DOES NOT PROVIDE A CAUSE OF ACTION AGAINST A NONPARTY TO A LABOR CONTRACT FOR INDUCING A PARTY'S BREACH OF THAT CONTRACT 18

CONCLUSION 32

TABLE OF AUTHORITIES

CASES Page

AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643 (1986) 16-17

BE&K Construction Co. v. NLRB, 536 U.S. 516 (2002) 26

Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176 (7th Cir. 1993) 19-21

Carbon Fuel Co. v. Mine Workers, 444 U.S. 212 (1979) 23, 28

Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489 (5th Cir. 1982) 28

Drake Bakeries v. Bakery Workers, 370 U.S. 254 (1962) 17

EEOC v. Waffle House, Inc., 534 U.S. 279 (2002) 19

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) 16

General Electric Co., 173 NLRB 253 (1968), *enf'd*, 412 F.2d 512 (2d Cir. 1969) 30

Howard Johnson Co. v. Hotel Employees, 417 U.S. 249 (1974) 23

Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002) 15-16

International Union, UMWA v. Covenant Coal Corp., 977 F.2d 895 (4th Cir. 1992) 19

Iron Mountain Security Storage Corp. v. American Specialty Foods, Inc., 457 F.Supp. 1158 (E.D. Pa. 1978) 21-22

Just's, Inc. v. Arrington Constr. Co., 99 Idaho 462, 583 P.2d 997 (1978), quoting W. Prosser, *Handbook of the Law of Torts*, § 92 (4th ed. 1971) 21

Kimbro v. Pepsico, Inc., 215 F.3d 723 (7th Cir. 2000) 21

Kobell v. United Paperworkers International Union, 965 F.2d 1401 (6th Cir. 1992) 31

Laborers Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539 (1988) 27

Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960), citing *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957) 20, 23

Litton Financial Printing Div. v. NLRB, 501 U.S. 190 (1991) 17

Loss v. Blankenship, 673 F.2d 942 (7th Cir. 1982) 20

NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958) 29

NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963) 26-27

NLRB v. Insurance Agents, 361 U.S. 477 (1960) 26

North Carolina Furniture, Inc., 121 NLRB 41 (1958) 29

Paperworkers Local 620 (International Paper Co.), 309 NLRB 44 (1992) 31

Perry v. UNUM Life Ins. Co., 353 F.Supp.2d 1237 (N.D. Ga. 2005) 22

Standard Oil Co. v. NLRB, 322 F.2d 40 (6th Cir. 1963) 30

Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960) 16-17, 24

Tamko Roofing Products v. Smith Engineering Co., 450 F.3d 822 (8th Cir. 2006) 29

Teamsters Local 287 (Granite Rock), 347 NLRB 339 (2006), *enf'd*, 293 Fed. Appx. 518 (9th Cir. 2008) 2-6, 30

Textron Lycoming Reciprocating Engine Div., Avco Corp. v. Automobile Workers, 523 U.S. 653 (1998) 19, 27

UMWA Health & Retirement Funds v. Robinson, 455 U.S. 562 (1982) 29

Union Pacific Railroad Co. v. Broth. of Locomotive Engineers & Trainmen Gen. Comm. of Adj., Cent. Reg., No. 08-604 2

United States Pipe and Foundry Co. v. NLRB, 298 F.2d 873 (5th Cir. 1962) 30

Vaca v. Sipes, 386 U.S. 171 (1967), citing *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965) 17

STATUTES

29 U.S.C. § 157 26

29 U.S.C. § 185(a) 19

MISCELLANEOUS

Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482 (1959) 16

Dobbs, *The Law of Torts* (2001) 22

H.R.Rep. No. 245, 80th Cong., 1st Sess. (1947) 20

Restatement (First) of Torts, vol. IV (1939) 24-26

Restatement (Second) of Torts, vol. 4 (1979) .... *passim*

S. Rep. No. 105, 80th Cong., 1st Sess. (1947) 20

IN THE
Supreme Court of the United States

No. 08-1214

GRANITE ROCK COMPANY,
Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS & TEAMSTERS LOCAL 287,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 57 national and international labor organizations with a total membership of 11.5 million working men and women.[1] The instant case presents two important questions regarding the judicial authority under § 301 of the Labor Management Relations Act to: i) order arbitration of disputes arising under labor con-

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

tracts; and ii) entertain legal claims of a noncontractual nature arising out of labor disputes. The AFL-CIO has frequently filed briefs in cases before this Court that concern the scope of judicial authority to resolve labor disputes, most recently in *Union Pacific Railroad Co. v. Broth. of Locomotive Engineers & Trainmen Gen. Comm. of Adj., Cent. Reg.*, No. 08-604.

STATEMENT

The instant case arises out of a labor dispute between the Granite Rock Company and Teamsters Local 287 in connection with those parties' negotiations over a collective bargaining agreement to succeed the agreement covering approximately two dozen cement truck drivers employed at the Company's San Jose, California, plant that expired on April 30, 2004. *Teamsters Local 287 (Granite Rock)*, 347 NLRB 339, 341-42 (2006), *enf'd*, 293 Fed. Appx. 518 (9th Cir. 2008).[2]

Granite Rock filed suit under § 301 of the Labor Management Relations Act alleging that Local 287 ratified and entered into a successor collective bargaining agreement on July 2, 2004, and breached the no-strike clause in that agreement by thereafter resuming its strike against the Company. JA 310-11 ¶s 20 & 23, 317 ¶ 41. Granite Rock's LMRA § 301 lawsuit also alleged that the International Brotherhood of Teamsters ("IBT") – the national labor organization with which Local 287 is affiliated – tortiously interfered with the successor collective bargaining agreement by encouraging and supporting

---

[2] The facts concerning the labor dispute are described in the comprehensive report of the National Labor Relations Board Administrative Law Judge issued after a two-day trial on Granite Rock's unfair labor practice charges against Local 287. *Teamsters Local 287*, 347 NLRB at 341-44.

the continuation of Local 287's strike. JA 318-19 ¶s 43-49. In the decision below, the Ninth Circuit ordered arbitration of Granite Rock's breach of contract claim against Local 287 under the grievance-arbitration provisions of the successor collective bargaining agreement and dismissed the tortious interference with contract claim against the IBT on the ground that it failed to state a claim under LMRA § 301. JA 61.

I. THE UNDERLYING LABOR DISPUTE.

The Granite Rock Company is engaged in the manufacture and supply of concrete for commercial use, operating out of 22 facilities located throughout northern California. JA 45; *Teamsters Local 287*, 347 NLRB at 341-42. The Company is a party to numerous collective bargaining agreements with various labor organizations, including agreements with four separate Teamsters locals. Pet. Br. 2; *Teamsters Local 287*, 347 NLRB at 342. All of the agreements contain similar no-strike clauses, generally prohibiting strikes during the term of the agreement but allowing covered employees to honor lawful picket lines at Granite Rock facilities established by employees not covered by the agreement, provided that the picket lines support union-sanctioned strikes that have been in effect for at least 15 working days. *Ibid.*

On March 23, 2004, Granite Rock and Local 287 commenced negotiations over a collective bargaining agreement to succeed the agreement that would expire on April 30. *Teamsters Local 287*, 347 NLRB at 341. Local 287 began a strike to support its bargaining position in early June. JA 45. Various other unions representing Granite Rock employees, including other Teamsters locals, honored Local 287's picket lines. 347 NLRB at 343 n. 4.

Early on the morning of July 2, Granite Rock and Local 287 reached a tentative agreement on the terms of a successor collective bargaining agreement. *Teamsters Local 287*, 347 NLRB at 343. Immediately after Granite Rock and Local 287 reached a tentative agreement on the successor collective bargaining agreement, the Company and the Local began discussing a back-to-work agreement resolving disputes growing out of the strike. *Ibid.* Local 287 wanted the back-to-work agreement to cover the employees and unions at other Granite Rock facilities who had honored Local 287's picket lines. *Id.* at 343-44. Granite Rock wanted the back-to-work agreement to be limited to employees at the San Jose facility represented by Local 287. *Ibid.* When the parties were unable to resolve their dispute over the scope of the back-to-work agreement, Local 287 resumed its strike. *Ibid.*

The Local 287 membership met later on the morning of July 2 to consider the tentative collective bargaining agreement. *Teamsters Local 287*, 347 NLRB at 343. Local 287 maintains that the membership did not vote on ratifying the agreement at that meeting but rather voted only on a particular part of the proposal that was controversial. *Ibid.* Granite Rock maintains that the Local 287 membership did vote to ratify the tentative agreement at the July 2 meeting. JA 310-11 ¶ 20. Both the Company and the Local agree that the tentative agreement would become effective only upon ratification by the Local 287 membership. JA 377 ¶ 16.

On August 22, 2004, the Local 287 membership voted to ratify the tentative agreement. JA 313 ¶ 27.[3] Granite Rock and Local 287 formally executed

---

[3] In the meantime, the collective bargaining agreement covering Granite Rock employees at the Company's San Benito

the collective bargaining agreement in December 2004. JA 448. By its terms, the agreement was in effect from May 1, 2004 until April 30, 2008. *Ibid.* The 2004-2008 agreement contained grievance-arbitration and no-strike provisions that, in all material respects, were identical to those contained in the predecessor agreement. JA 310 ¶ 18.

II. THE UNFAIR LABOR PRACTICE CASE.

On July 8, 2004, Granite Rock filed charges with the National Labor Relations Board alleging that Local 287 had violated § 8(b)(3) of the National Labor Relations Act by refusing to hold a ratification vote on the tentative collective bargaining agreement until the Company accepted the Local's proposed back-to-work agreement protecting employees and unions in other bargaining units who had honored Local 287's picket lines. *Teamsters Local 287*, 347 NLRB at 343-44. The General Counsel issued a complaint based on the Company's charges alleging that Local 287 had failed to bargain in good faith. *Id.* at 341. The General Counsel argued that the Local's refusal to hold a July 2 ratification vote was an unfair labor practice *both* because the parties had reached a tentative agreement subject to the single condition that it be ratified *and* because the demand to protect employees and unions in other bargaining units was not a mandatory subject of bargaining as it did not concern the terms and conditions of employment in the San Jose bargaining unit. *Id.* at 345.

After a two-day trial, in which Granite Rock participated, the NLRB Administrative Law Judge found that the tentative agreement had *not* been

---

quarry had expired on July 15. *Teamsters Local 287*, 347 NLRB at 342, 344. The Local 287 membership remained away from work until September 13, honoring the quarry workers' picket lines. *Id.* at 344.

ratified on July 2. *Teamsters Local 287*, 347 NLRB at 341, 343. Rather, the ALJ found that the agreement was first ratified on August 22. *Id.* at 344. Nevertheless, the ALJ concluded that the delay in holding the ratification vote was an unfair labor practice, because the parties had reached agreement subject to the single condition of ratification by the Local 287 membership and the Local had a duty to conduct the ratification vote in a timely manner. *Ibid.* The ALJ recommended that Local 287 be ordered to cease and desist from refusing to bargain with Granite Rock by unduly delaying the submission of the tentative agreement for ratification. *Id.* at 346.

The NLRB adopted the ALJ's findings and conclusion. *Teamsters Local 287*, 347 NLRB at 339. The Board modified the ALJ's recommended remedy by ordering Local 287 to "make the contract effective as of July 2" on the ground that, "[b]ut for the unlawful failure to submit the contract for ratification on July 2, the employees would have ratified it on that date (as they did at the ratification vote of August 22)." *Ibid.*

III. THE INSTANT LMRA § 301 LAWSUIT.

On July 9, 2004, Granite Rock filed an LMRA § 301 suit against Local 287 alleging that the parties had entered into a new collective bargaining agreement on July 2 and that the Local's strike after that date breached the agreement's no-strike clause. JA 62-69. *See also* JA 70-79 (First Amended Complaint filed on July 22). On July 26, the District Court held a hearing on the Company's request for a preliminary injunction against the strike. JA 212-13. The Court advanced the trial on the merits to that date, and finding that Local 287 had not ratified the tentative agreement on July 2, entered judgment dismissing

the complaint. *Ibid.*

On January 24, 2005, the District Court granted Granite Rock's motion for a new trial based on new evidence concerning Local 287's July 2 membership meeting. JA 225. Local 287 then filed an answer on February 17, 2005, raising as an affirmative defense that Granite Rock's breach of contract claim "is subject to the grievance and arbitration provisions of the collective bargaining agreement *now in effect* between the parties." Teamsters Local 287 Brief 5 (quoting Answer, Dk. No. 48; emphasis added). *See* JA 347 ("presents a dispute subject to the grievance and arbitration provisions of the CBA presently in effect between the parties"). The Local thereafter moved to compel arbitration of Granite Rock's breach of contract claim. JA 226, 343. The District Court refused to compel arbitration on the ground that to order arbitration the Court would have to first find that the agreement had been ratified on July 2. JA 360-61. In the Spring of 2007, the District Court held a jury trial confined to the single issue of when the agreement had been ratified. JA 378-80. Based on the jury's finding that the new collective bargaining agreement had been ratified on July 2, the District Court then ordered arbitration of the remaining elements of Granite Rock's claim that continuation of the strike after that date violated the agreement's no-strike clause. JA 381-82.

In the meantime, on February 17, 2006, Granite Rock filed a Second Amended Complaint. JA 249-258. The Second Amended Complaint realleged the breach of contract claim against Local 287. *Ibid.* The Second Amended Complaint added the IBT as a defendant along with Local 287 to the breach of contract claim alleging that "Defendant IBT and Defendant Local 287 were in an agency relationship at all

times hereto in which the IBT exerted actual control over Local 287." JA 256 ¶ 18.

The IBT moved to dismiss the breach of contract claim against it on the ground that it was not a party to the agreement. At the hearing on that motion, Granite Rock's attorney explained that the breach of contract claim against the IBT was premised on the theory that Local 287 had negotiated the agreement on behalf of the IBT as an undisclosed principal. JA 281, 289. The District Court noted that this ground for finding the IBT to be a party to the collective bargaining agreement had not been sufficiently alleged and warned the Company attorney that if he realleged that claim without sufficient factual basis, the Court would sanction him under Rule 11. JA 281-82. The Company attorney then suggested that he also wished to present an alternative claim against the IBT of interference with contract based on the premise that the IBT was not a party to the agreement. JA 290-91. On May 23, 2006, the District Court dismissed the claim that the IBT had violated the agreement and expressly declined to address whether LMRA § 301 would support a tortious interference claim. JA 303.

On June 8, 2006, Granite Rock filed its Third Amended Complaint. JA 304-21. The First Claim for Relief stated in the Third Amended Complaint was for "Breach of Contract Against Defendant Local 287." JA 316-17. The Second Claim for Relief was for "Interference/Inducement of Breach of Contract Against Defendant IBT." JA 317-18. The Third Amended Complaint did not allege that the IBT had itself breached the collective bargaining agreement but instead alleged that "Defendant IBT induced Local 287 to violate its promises to, and/or to breach its Agreement with Plaintiff' and did so "maliciously

with intent to interfere with the Agreement." JA 318 ¶s 44 & 46. On October 5, 2006, the District Court dismissed the tortious interference claim against the IBT on the ground that LMRA §301 does not support such a claim. JA 332. On December 13, 2006, the Court granted the Company's request to certify the dismissal of the tortious interference claim for immediate appeal on the grounds that this claim was "legally and factually severable" from the remaining breach of contract claim against Local 287. JA 338.

On consolidated appeals, the Ninth Circuit reversed the District Court's denial of Local 287's original motion to compel arbitration of all elements of Granite Rock's entire breach of contract claim against the Local, including the dispute over the date of ratification, finding that "both parties consented to arbitration." JA 60. In addition, the Court of Appeals affirmed the District Court's dismissal of Granite Rock's claim against the IBT on the ground that LMRA § 301 does not provide a cause of action against a nonparty for inducing a party to breach its collective bargaining agreement. JA 49.

SUMMARY OF ARGUMENT

The complaint filed by Granite Rock under § 301 of the Labor Management Relations Act contains two distinct claims, each brought against a different defendant. The first claim is for "Breach of Contract Against Defendant Local 287." JA 316. The second claim is for "Interference/Inducement of Breach of Contract Against Defendant IBT." JA 317. Teamsters Local 287 is the union party to a collective bargaining agreement with Granite Rock. The International Brotherhood of Teamsters (IBT) does not have any contractual relationship with Granite Rock.

I. The 2004-2008 collective bargaining agreement between Granite Rock and Local 287 provides that

"[a]ll disputes arising under this agreement shall be resolved in accordance with the [contractual grievance-arbitration] procedure." JA 434. Granite Rock's breach of contract claim against Local 287 – that the Local breached the collective bargaining agreement's no-strike clause by resuming a strike on July 2, 2004 – is a "dispute[] arising under th[e] agreement" and is therefore the type of dispute that the parties agreed to submit to arbitration.

Whether the Local's post-July 2, 2004, strike breached the no-strike clause in the 2004-2008 collective bargaining agreement turns on whether the agreement was ratified on July 2, 2004, as Granite Rock maintains, or on August 22, 2004, as the Local maintains. The dispute over the ratification date has nothing to do with whether the dispute is subject to arbitration, because either way the entire agreement, including its arbitration clause, was ratified before Local 287 responded to Granite Rock's complaint in February 2005 by moving to compel arbitration of the Company's breach of contract claim. The Ninth Circuit, therefore, correctly ordered arbitration of Granite Rock's breach of contract claim against Local 287 without itself resolving the dispute over the ratification date.

II. Granite Rock's claim for "Interference/Inducement of Breach of Contract Against Defendant IBT," JA 317, does not allege a breach of contract by the IBT itself. The IBT is not a party to the Granite Rock/Local 287 collective bargaining agreement and has not assumed any obligations under that agreement. Granite Rock's claim against the IBT is for tortious interference by a nonparty with a party's performance of its contract.

LMRA § 301 provides for breach of contract suits seeking to enforce contractual obligations created by

collective bargaining agreements. Section 301 does not provide for the creation of a federal common law of tortious interference with collective bargaining agreements. To the extent that the common law at one time did provide for such tort claims in regard to labor disputes that body of law has been superseded by the National Labor Relations Act, which is administered and enforced by the National Labor Relations Board.

ARGUMENT

I. GRANITE ROCK WAS PROPERLY ORDERED TO ARBITRATE ITS BREACH OF CONTRACT CLAIM AGAINST LOCAL 287.

Granite Rock's LMRA § 301 claim against Local 287 asserts a breach of the no-strike provision contained in the parties' 2004-2008 collective bargaining agreement. JA 316-17. In this regard, Granite Rock alleges:

> i) that "[t]he Agreement to which both Plaintiff and Defendant Local 287 were parties, contained an express no-strike provision and a mandatory grievance procedure and existed as of July 2, 2004," JA 316-17 ¶ 38; and
>
> ii) that "Defendant Local 287 breached the Agreement by continuing [after July 2, 2004] to engage in a strike that violated the no-strike provision of the Agreement," JA 317 ¶ 39.

Local 287's answer to the Company's complaint raised two defenses: first, that the agreement was not ratified – and thus did not go into effect for purposes of the no-strike clause – until August 22, 2004; and second, that Granite Rock's breach of contract claim "is subject to the grievance and arbitration provisions of the collective bargaining agreement

now in effect between the parties." Teamsters Local 287 Brief 5 (quoting Answer, Dk. No. 48; emphasis added). *See* JA 346-47. Finding that "both parties have consented to arbitration," the Ninth Circuit held that "Granite Rock's claims against Local 287 should have been dismissed in favor of arbitration." JA 61.

A. Granite Rock maintains that the Court of Appeals erred in ordering arbitration without itself resolving the dispute between the Company and Local 287 over exactly when in 2004 the new collective bargaining agreement was ratified. Pet. 18-19. Granite Rock argues, in this regard, that "the federal court, not the arbitrator, has the authority to determine whether a binding contract containing an arbitration provision was initially formed." Pet. Br. 15 (capitalization omitted). However, there is no dispute that a "binding contract containing an arbitration provision" was formed at some point in 2004, well before Local 287 moved to compel arbitration of Granite Rock's breach of contract claim under the new agreement. The dispute over exactly when the agreement was formed thus has nothing to do with the arbitrability of Granite Rock's claim under the agreement and goes entirely to the merits of that claim.

The "grievance and arbitration provisions of the [2004-2008] CBA" were "presently in effect" at the time Local 287 answered Granite Rock's complaint and moved to compel arbitration. JA 347. The 2004-2008 collective bargaining agreement was ratified by Local 287 no later than August 22, 2004 and was formally executed by the parties in December 2004. JA 313 ¶ 27, 448. By its terms, the new agreement was in effect from May 1, 2004, the day after the old agreement expired. JA 448. Thus, the collective

bargaining agreement, including the commitment to handle all disputes under the agreement through its grievance-arbitration procedures, was indisputably in effect in early 2005, when Local 287 responded to Granite Rock's complaint by moving for arbitration of the breach of contract claim. JA 229.

The 2004-2008 collective bargaining agreement between Granite Rock and Local 287 provides – as did the parties' previous collective bargaining agreements – that "[a]ll disputes arising under this agreement shall be resolved in accordance with the [contractual grievance-arbitration] procedure." JA 434. The agreement further provides that a "dispute [may be] referred to arbitration by either party" and that "the Arbitrator shall be either Franklin Silver or another Arbitrator mutually agreed upon by both parties." JA 435.

There is no question that Granite Rock's claim that Local 287 breached the no-strike clause of the 2004-2008 collective bargaining agreement presents a "dispute[] arising under this agreement." JA 434. The Company's claim rests entirely on the premise that the Local had a contractual obligation under that agreement not to continue its strike after July 2, 2004. Thus, the sole question presented by Granite Rock's breach of contract claim against Local 287 is whether the continuation of the strike after July 2 violated the agreement.

Given all this, the Court of Appeals was plainly right to order arbitration of Granite Rock's breach of contract claim against Local 287 without first resolving the dispute over the exact date of ratification.

B. For the most part, Granite Rock's argument to the contrary rests on nothing more than a sleight of hand. The Company notes – correctly – that "Local 287 disputed that the Agreement was formed" on

July 2, 2004, but then adds – deceptively – that "Local 287 continues to claim that the Company's employees never ratified the Agreement." Pet. Br. 22. Based on that characterization of the Local's position, Granite Rock argues that the dispute over the exact ratification date of the 2004-2008 collective bargaining agreement raises a "question[] about the existence . . . of an arbitration agreement [that] must be decided initially by the courts." Pet. Br. 15.

However, Local 287 does *not* claim that the Local membership *never* ratified the 2004-2008 agreement. To the contrary, the Local's motion to send Granite Rock's breach on contract claim to arbitration expressly invoked "the grievance and arbitration provisions of the CBA *presently in effect* between the parties." JA 347 (emphasis added). *See also* Teamsters Local 287 Brief 5 (quoting Answer).

The only dispute regarding ratification of the collective bargaining agreement is over whether the agreement was ratified on July 2, as Granite Rock asserts, or on August 22, as Local 287 asserts. But that dispute has nothing to do with "the existence . . . of an arbitration agreement," Pet. Br. 15, at the time Local 287 moved to compel arbitration. By that time, the parties had indisputably consummated the 2004-2008 collective bargaining agreement containing an express commitment to resolve all disputes arising under that agreement through arbitration.

Nor is there any question for judicial resolution regarding the "scope of [that] arbitration agreement." Pet. Br. 15. The grievance-arbitration provision in the 2004-2008 collective bargaining agreement covers "[a]ll disputes arising under this agreement" and provides that a "dispute [may be] referred to arbitration by either party." JA 434-35. Thus, Granite Rock's claim that Local 287 violated the 2004-2008

agreement by continuing its strike beyond July 2 was most certainly within the scope of the arbitration agreement.

C. The dispute between Granite Rock and Local 287 over whether the collective bargaining agreement was ratified on July 2, 2004, or August 22, 2004 concerns the substantive application of the agreement – i.e., did the agreement's no-strike clause cover the post-July 2 strike action – and thus goes to the merits of the Company's claim that the post-July 2 strike action breached the agreement. Because the 2004-2008 collective bargaining agreement was clearly in effect by the time Local 287 moved to compel arbitration of the Granite Rock's breach of contract claim, the dispute over the exact ratification date does not raise any "question of arbitrability" to be decided by a court.

The "questions of arbitrability" that must be decided by a court arise in the "narrow circumstances . . . where reference of [a] gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002). Thus, "gateway" arbitrability issues concern matters such as "whether the parties are bound by a given arbitration clause" and "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." *Howsam*, 537 U.S. at 83-84. As Professor Archibald Cox observed in a seminal law review article on labor arbitration, "giving the court the duty to determine whether the claim which one side wishes to arbitrate gives rise to a dispute concerning the 'interpretation and application' of the collective-bargaining agreement" ensures that "the arbitrator [does not have] unlimited power to determine his own jurisdiction"

and grants each party "the right to a judicial determination upon whether the arbitrator has jurisdiction over the subject matter" while leaving "all other questions – procedural, jurisdictional or substantive – . . . solely within the power of the arbitrator to determine." Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1509-11 (1959).[4]

In determining whether "the arbitrator has jurisdiction over the subject matter" of a dispute, Cox, 72 Harv. L. Rev. at 1511, – i.e., "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy," *Howsam*, 537 U.S. at 84 – "a court is not to rule on the potential merits of the underlying claims," *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986). There is "a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," and all "[d]oubts should be resolved in favor of coverage.'" *Id.* at 650, quoting *Warrior & Gulf*, 363

---

[4] Professor Cox's views in this regard were cited by this Court in *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960), as the sole authority for the statement that "the question of arbitrability is for the courts to decide." *Id.* at 583 n. 7 citing 72 Harv. L. Rev. at 1508-09. And, the *AT&T Technologies* Court quoted at length from Professor Cox's article to explain why "[t]he willingness of parties to enter into agreements that provide for arbitration of specified disputes would be 'drastically reduced' . . . if a labor arbitrator had the 'power to determine his own jurisdiction.'" 475 U.S. at 651 quoting 72 Harv. L. Rev. at 1509. *See also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995), citing 72 Harv. L. Rev. at 1508-09.

U.S. at 582-583.[5]

Given the foregoing, the question of whether the collective bargaining agreement was ratified on July 2, 2004, or on August 22, 2004, is not a "question of arbitrability" for a court to decide. The arbitrator designated in the Granite Rock and Local 287 in their collective bargaining agreement clearly has "subject matter jurisdiction" over a claim that the Local violated the agreement's no-strike clause, because this is the "type of controversy" the parties agreed to arbitrate. The question of whether the no-strike clause had gone into effect at the time of the strike goes to "the potential merits of the underlying claims." *AT&T Technologies*, 475 U.S. at 649.

In sum, "[s]ince [Granite Rock's] claim is based upon breach of the collective bargaining agreement, [it] is bound by terms of that agreement which govern the manner in which contractual rights may be enforced." *Vaca v. Sipes*, 386 U.S. 171, 184 (1967), citing *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). By granting Local 287's motion to compel arbitration of Granite Rock's breach of contract claim, the Ninth Circuit "simply remit[ted] the company to the forum it agreed to use for processing its strike damage claims." *Drake Bakeries v. Bakery Workers*, 370 U.S. 254, 266 (1962).

---

[5] In *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 209 (1991), this Court refused to "apply th[e] presumption [of arbitrability] wholesale in the context of an expired bargaining agreement, [because] to do so would make limitless the contractual obligation to arbitrate." At the same time, however, the Court made clear that the "presumption of arbitrability" would apply fully "where an effective bargaining agreement exists between the parties, and the agreement contains a broad arbitration clause." *Ibid.* Here "an effective bargaining agreement [containing a broad arbitration clause] exists between the parties," and thus the "presumption of arbitrability" fully applies.

II. LMRA § 301 DOES NOT PROVIDE A CAUSE OF ACTION AGAINST A NON-PARTY TO A LABOR CONTRACT FOR INDUCING A PARTY'S BREACH OF THAT CONTRACT.

Granite Rock's sole LMRA § 301 claim against the International Brotherhood of Teamsters ("IBT") – "a non-signatory to Granite Rock and Local 287's labor contract," Pet. Br. 31, which "agreement did not mention IBT, and did not govern any rights or duties of IBT," JA 49 – is for "interference/inducement of breach of contract." JA 317 (Second Claim for Relief; capitalization omitted).[6] To make out that claim, Granite Rock alleged that the IBT "induced Defendant Local 287 to violate its promises to, and/or to breach its Agreement with [Granite Rock]" and did so "maliciously with intent to interfere with the Agreement" for the ultimate purpose of "put[ting] pressure on [Granite Rock] to agree to a Back to Work Agreement that included hold-harmless provisions that would protect Defendant IBT, Local 287 and the Teamsters Locals . . . from liability for their actions related to the unlawful strike." JA 318 ¶s 44-46.

What Granite Rock thus pled as an LMRA § 301 claim against the IBT was the common law tort of "intentionally and improperly interfer[ring] with the

---

[6] The "interference/inducement of breach of contract" claim against the IBT was first pled in Granite Rock's Third Amended Complaint. JA 317-19. The Company's Second Amended Complaint had pled a breach of contract claim against the IBT on the theory that Local 287 had entered into the collective bargaining agreement with Granite Rock as an agent of the IBT. JA 255-56 ¶ 18. Granite Rock abandoned the breach of contract claim against the IBT after the District Court warned the Company's attorney that he would be subject to sanctions under Rule 11 if he realleged that claim without adequate factual basis. *See* JA 281-82.

performance of a contract . . . between another and a third person by inducing . . . the third person not to perform the contract." *Restatement (Second) of Torts* § 766 (1979). The courts below held that Granite Rock's "claim [against the IBT] for tortious interference cannot be said to 'arise under' the new CBA between Granite Rock and Local 28" and thus does not state an actionable § 301 claim. JA 49. As we now show, that holding is clearly correct.

A. Section 301 provides for "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . ." 29 U.S.C. § 185(a). "By its terms, this provision confers federal subject-matter jurisdiction only over '[s]uits for violation of contracts'" and does not confer federal jurisdiction over every suit that somehow "concerns a violation of contract." *Textron Lycoming Reciprocating Engine Div., Avco Corp. v. Automobile Workers*, 523 U.S. 653, 656 (1998).

A critical dividing line between suits within § 301's scope and those outside its scope is the line between suits to enforce contractual obligations and suits to enforce noncontractual legal obligations. "'Suits for violation of contracts' under § 301(a) are . . . suits that claim a contract has been violated." *Textron*, 523 U.S. at 657. Precisely because "a contract cannot bind a nonparty," *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002), it follows that "only a party to a contract can violate that contract" and "that a suit against a nonsignatory of a contract cannot be considered a suit for violation of the contract," *International Union, UMWA v. Covenant Coal Corp.*, 977 F.2d 895, 897 (4th Cir. 1992).

By its terms, then, "section 301 is . . . a grant of jurisdiction only to enforce contracts," *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1180

(7th Cir. 1993), and "does not provide the basis for an LMRA claim *against* a nonparty to the underlying collective bargaining agreement," *Loss v. Blankenship*, 673 F.2d 942, 946 (7th Cir. 1982) (emphasis in original). Section 301's text is thus carefully calibrated to achieve Congress' goal of "mak[ing] collective-bargaining contracts equally binding and enforceable on both *parties*." S.Rep. No. 105, 80th Cong., 1st Sess. 15 (1947) (emphasis added). *See also id.* at 15 ("binding on both parties," "mutually binding on both parties to the contract"), 16 ("promote industrial peace through faithful performance by the parties"), 17 ("promote a higher degree of responsibility upon the parties to such agreements"); H.R.Rep. No. 245, 80th Cong., 1st Sess. 45-46 (1947) ("actions and proceedings involving violations of contract between employers and labor organizations may be brought by either party").

The long and the short of the matter is that Granite Rock's "interference/inducement of breach of contract" claim against the IBT does not rest on any alleged "violation of contract[]" *by the IBT*. Rather, that claim rests on the theory that the IBT violated some noncontractual legal obligation derived from some source other than the collective bargaining agreement in question. The courts below correctly concluded that the LMRA § 301 grant to the federal courts of jurisdiction over "suits for violation of contracts" does not grant jurisdiction over suits for violations of noncontractual legal obligations.

B. To be sure, "Section 301 authorizes federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements." *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 471 (1960), citing *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). But "[t]he common law to be made

is a common law of contracts, not a source of independent rights, let alone tort rights," *Brazinski*, 6 F.3d at 1180, for "section 301 creates a right of action only for breach of a collective bargaining agreement; it is not a tort statute," *Kimbro v. Pepsico, Inc.*, 215 F.3d 723, 727 (7th Cir. 2000).

That point is dispositive, because a claim against a nonparty to a contract for inducing a party's breach of the contract is, as a matter of basic legal principles, not a contract claim at all but a particular kind of tort claim, i.e., a claim for "intentionally and improperly interfer[ing] with the performance of a contract . . . between another and a third person by inducing . . . the third person not to perform the contract." *Restatement (Second) of Torts* § 766.

"The fundamental difference between tort and contract," is this:

> "Tort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by the law, and are based primarily upon social policy, and not necessarily upon the will or intention of the parties. . . . Contract actions are created to protect the interest in having promises performed. Contract obligations are imposed because of conduct of the parties manifesting consent, and are owed only to the specific individuals named in the contract." *Just's, Inc. v. Arrington Constr. Co.*, 99 Idaho 462, 583 P.2d 997, 1003 (1978), quoting W. Prosser, *Handbook of the Law of Torts*, § 92, p. 613 (4th ed. 1971).

More tersely stated, "[t]ort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensual agreements between particular individuals." *Iron Mountain Security Stor-*

age Corp. v. American Specialty Foods, Inc., 457 F.Supp. 1158, 1165 (E.D. Pa. 1978).

The heart of the matter is that an action against a nonparty for interference with a party's performance of a contract does *not* seek the enforcement of contractual rights and obligations. Indeed, "it is essential to a claim of tortious interference with contractual relations that the plaintiff establish that the defendant is a third party, i.e., a stranger to the contract with which the defendant allegedly interfered." *Perry v. UNUM Life Ins. Co.*, 353 F.Supp.2d 1237, 1240 (N.D. Ga. 2005). And, a variation on the tort imposes liability on a stranger to the relationship who prevents the contract from even being formed. *Restatement (Second)* § 766B ("Intentional Interference with Prospective Contractual Relation").

Rather, "Intentional Interference with Performance of Contract by Third Persons" – like all torts – is concerned with enforcing social norms established by the courts and not with enforcing norms the parties to a contract have established by their agreement. The tort of intentional interference with contract is thus concerned not with every "interfer[ence] with the performance of a contract" but only "*improper*[] interfere[nce]" as "improper" is defined by the courts. *Restatement (Second)* § 766 (emphasis added). *See* Dobbs, *The Law of Torts* vol. 2, § 446, p. 1259 (2001) ("intentional and improper interference with the plaintiff's contract . . . with another"). The "factors [to be considered] in determining whether interference is improper" have nothing to do with the terms of the contract in question or whether the defendant has violated a contractual obligation to the plaintiff and instead turn on "whether the [defendant's] conduct was fair and reasonable under the circumstances." *Restatement (Second)* § 767 & comment j,

p. 37.

Among the factors to be considered in determining whether interference is "improper" are: "the nature of the actor's conduct," "the actor's motive," "the interests sought to be advanced by the actor," "the societal interests in protecting the freedom of action of the actor and the contractual interests of the other," and "the relations between the parties." *Restatement (Second)* § 767. Thus, in determining whether interference with a contract is wrongful:

> "The issue in each case is whether the interference is improper or not under the circumstances; whether, upon a consideration of the relative significance of the factors involved, the conduct should be permitted without liability, despite its effect of harm to another. The decision therefore depends upon a judgment and choice of values in each situation." *Id.* comment b, p. 28.

None of this broad-gauged judicial policy-making has anything to do with the courts' charge to "fashion a body of federal law for the enforcement of . . . collective bargaining agreements." *Lincoln Mills*, 353 U.S. at 451. To the contrary, this Court has repeatedly cautioned that "*Lincoln Mills* did not envision any freewheeling inquiry into what the federal courts might find to be the most desirable rule." *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 255 (1974). Rather, "the policy of free collective bargaining" that was of "particular importance" to "the 1947 Taft-Hartley Act Congress" that enacted § 301 requires "that the parties' agreement primarily determines their relationship" and makes it inappropriate for courts exercising § 301 jurisdiction to "substitute a different resolution" for that reached by the parties to the agreement. *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212, 218-19 (1979).

C. While we believe that the foregoing is dispositive, we would be derelict if we did not add – as the *Restatement (Second) of Torts*, Div. Nine, Introductory Note, vol. 4, p. 2, expressly recognized – that Congress' enactment of the National Labor Relations Act has served to transfer the authority for policing allegedly improper union or employer interference with labor contracts from the common law courts to the National Labor Relations Board. The enactment of the NLRA and the creation of the NLRB to administer that statute seals the case against reading LMRA § 301 as licensing the judicial creation of a body of federal tort law regarding interference with labor contracts.

Prior to the enactment of the National Labor Relations Act, the common law of torts had developed a comprehensive set of rules governing permissible and impermissible conduct in labor disputes. These rules were summarized in Chapter 38 ("Labor Disputes") of the *Restatement (First) of Torts* (1939).[7] Chapter 38's rules governing "Labor Disputes" were treated as a subset of the rules defining liability for "Inducing Breach of Contract or Refusal to Deal," and were described by the *Restatement (First)* as "applications to the concerted action by workers of the general principles underlying the rule[s] [regarding] . . . Concerted Refusal to Deal and . . . Inducing Refusal to Deal or Breach of Contract." *Restatement (First) of Torts*, vol. IV, pp. 48-49, 93-94. In other words,

---

[7] Work began on the division of the *Restatement* on Interferences in Interests in Business Relations in the Fall of 1936 under the direction of Harry Shulman, an influential professor of labor law at the Yale Law School. *Restatement (First)*, vol. IV, Introduction, p. vii. *See, e.g., Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. at 578-80 (relying upon Professor Shulman's work).

Chapter 38 of the *Restatement (First) of Torts* articulated the *pre-NLRA* application of the interference with contract tort to the particular context of labor disputes.

The basic pre-NLRA common law tortious interference rule was summarized by the *Restatement (First) of Torts* as follows:

> "Workers are privileged intentionally to cause harm to another by concerted action if the object and the means of their concerted action are proper; they are subject to liability to the other for harm so caused if either the object or the means of their concerted action is improper." *Restatement (First)* § 775.

The First *Restatement of Torts* gave the following rationale for this basic rule:

> "Concerted action by workers merely in making requests of employers, without threat of pressure to secure concession, causes no harm and is not actionable; but concerted action to enforce the requests necessarily involves pressure on the employer which may cause him financial loss or at least interfere with his freedom to operate his business as he likes. Such concerted action, then, necessarily involves the infliction of intentional harm. This was regarded as subjecting the workers to liability unless their conduct was justified; and this theory has prevailed. The development of the law in succeeding years has related to the issue of justification." *Restatement (First)* Ch. 38, Introductory Note, pp. 94-95.

"[I]n the case of labor combinations," then, the pre-NLRA tortious interference law was premised on the notion "that mere concert may make illegal or at least require justification for conduct in which individuals are free to engage without the requirement of

justification when acting independently." *Restatement (First)* Ch. 38, Introductory Note, p. 95.

Accordingly, Chapter 38 of the *Restatement (First)* contained elaborate rules defining what was proper or improper with regard to "Objects of Concerted Action," *id.* §§ 784-796, and with regard to "Types of Concerted Action by Employees in Aid of Dispute[s] With [Their] Own Employer," *id.* §§ 797-801, or "in Aid of Dispute[s] With Another Employer," *id.* §§ 802-806.

In enacting the National Labor Relations Act, Congress rejected the notion that "[c]oncerted action by workers . . . in making requests of employers" that "involves pressure on the employer" should "subject[] the workers to liability unless their conduct was justified." *Restatement (First)*, pp. 94-95. To the contrary, the NLRA affirmatively guarantees employees the right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. And, "[t]he presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the [NLRA] recognized." *NLRB v. Insurance Agents*, 361 U.S. 477, 489 (1960).

Equally to the point here, the NLRA established the National Labor Relations Board as the agency charged with defining and enforcing the federal labor law. "Congress' later enactment of the NLRA" thus "took from the courts much of the power to regulate the relations between employers of labor and workingmen by granting authority to an administrative agency." *BE&K Construction Co. v.* NLRB, 536 U.S. 516, 543 (2002) (Breyer, J., concurring). It was henceforth "the Board's special function" to consider "carefully the interests of both sides of any labor-management controversy" and "balanc[e] the . . . con-

flicting legitimate interests" in a manner that "effectuate[s] national labor policy." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963).

The reporters who drafted the post-NLRA *Restatement (Second) of Torts* found it "[o]bvious[]" that "the law of labor disputes and their effect in interfering with contractual relations has ceased to be regarded as a part of Tort Law and has become an integral part of the general subject of Labor Law, with all of its statutory and administrative regulations." *Restatement (Second)*, Div. Nine, Introductory Note, vol. 4, p. 2. "Chapter 38 . . . entitled Labor Disputes" was therefore "omitted from the Second Restatement of Torts." *Ibid.*

In other words, following the enactment of the National Labor Relations Act, the "rules of the game," *Restatement (Second)* § 767, comment j, p. 37, with respect to labor relations – and particularly "[t]he rules governing disputes that arise out of the collective-bargaining process" – "are within the special competence of the National Labor Relations Board." *Textron*, 523 U.S. at 662 (Stevens, J., concurring). Although "[t]here are situations in which district judges must occasionally resolve labor issues, . . . they surely represent the exception rather than the rule." *Laborers Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 552 (1988).

As the pre-NLRA development of tort law up to the appearance of the *Restatement (First) of Torts* demonstrates, the judicial development and application of an LMRA § 301 common law of tortious interference with contractual relations would deeply involve the courts in weighing conflicting labor relations interests to demarcate which economic weapons are proper and which are improper in the collective bargaining context. Congress plainly did not intend

LMRA § 301's grant of jurisdiction to enforce collective bargaining agreements to become the source of a full-blown judicially-created system of rules regulating labor disputes that would supplement the rules articulated and enforced by the NLRB.

D. In the end, Granite Rock's argument is a plea that "public policy mandates that Granite Rock have a remedy under Section 301(a)" for the IBT's alleged inducement of Local 287 to breach the no-strike clause in the Local's agreement with Granite Rock, because without such a § 301 claim against the IBT "Granite Rock would be without a remedy" for the Local's breach of contract. Pet. Br. 54 (capitalization omitted). Leaving aside the obvious rejoinder that Granite Rock clearly has a remedy against Local 287 for any breach of the no-strike clause committed by that party to the collective bargaining agreement, it is simply not true that without the resurrection of the law of tortious interference with labor contracts employers will be left without a remedy for wrongful international union conduct of the kind that Granite Rock alleges here.

In the first place, the contract law rules that do apply under § 301 provide ample means for employers to protect themselves from such wrongful international union conduct.

Just as separate corporations can be treated as "alter egos" in order to apply a collective bargaining agreement to a nonsignatory employer, *see, e.g., Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 504-507 (5th Cir. 1982), it is possible to "pierce the shield that Congress took such care to construct" in § 301(e)'s "clear statement of the limits of an international union's legal responsibility for the acts of one of its local unions," *Carbon Fuel*, 444 U.S. at 217-18. But to pierce the shield between

an international union and its local affiliate, just as to pierce the shield between a parent corporation and its subsidiary, it is necessary to show *both* "a unity of interest and ownership [or control] . . . such that their separate personalities no longer exist" *and* that "an inequitable result will follow" if the shield is not pierced. *Tamko Roofing Products v. Smith Engineering Co.*, 450 F.3d 822, 827 (8th Cir. 2006). Granite Rock has not alleged that either of these preconditions exists here.

Beyond that, Granite Rock could have bargained to make the IBT a party to the agreement, *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 350 (1958), or to make the IBT's resources available to cover damages resulting from breach of the no-strike clause, *North Carolina Furniture, Inc.*, 121 NLRB 41, 41-42 (1958). Such demands are recognized as lawful, permissive (but not mandatory) subjects of bargaining. *See North Carolina Furniture*, 121 NLRB at 42. Granite Rock did not bargain to include either provision in the Company's agreement with Local 287, and so long as "neither the collective-bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective-bargaining contract." *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 576 (1982).

Aside from the contract law remedies available under LMRA § 301, the unfair labor practice provisions of the National Labor Relations Act provide employers with additional protections against wrongful international union interference with the collective bargaining relationships between employers and local union affiliates of the international.

The alternative unfair labor practice theory advanced by the NLRB General Counsel in the unfair

labor practice case against Local 287 was that the Local "violated Section 8(b)(3) by conditioning the holding of the ratification vote on the Employer's willingness to reach agreement on nonmandatory subjects of bargaining," i.e., a "back-to-work agreement [that] covered other unions and other bargaining units." *Teamsters Local 287*, 347 NLRB at 345.[8] The NLRB General Counsel's alternative unfair labor practice theory thus alleges essentially the same sort of wrongdoing as Granite Rock's LMRA § 301 interference with contract claim against the IBT, i.e., interfering with the formation of a Granite Rock/Local 287 collective bargaining agreement "in order to put pressure on [Granite Rock] to agree to a Back to Work Agreement that included hold-harmless provisions that would protect Defendant IBT, Local 287 and the Teamsters Locals, all of which are affiliated with the IBT, from liability for their actions related to the unlawful strike." JA 318 ¶ 45.

The overlap between Granite Rock's § 301 claim against the IBT and the NLRB General Counsel's unfair labor practice complaint against Local 287 brings

---

[8] The NLRB has a complicated set of rules for determining when it is appropriate to interject issues concerning other bargaining units into negotiations. For example, it is an unfair labor practice for an international union to condition approval of a collective bargaining agreement between an employer and one of the international's local affiliates on the employer reaching agreement with another local affiliate. *Standard Oil Co. v. NLRB*, 322 F.2d 40, 45 (6th Cir. 1963). But it is not an unfair labor practice for the locals to all demand common expiration dates for their various agreements with the employer. *United States Pipe and Foundry Co. v. NLRB*, 298 F.2d 873, 877-78 (5th Cir. 1962). And the locals may demand that the employer bargain each agreement with a committee composed of representatives from all of the locals. *General Electric Co.*, 173 NLRB 253, 256 (1968), *enf'd*, 412 F.2d 512 (2d Cir. 1969).

into play the NLRA rule that an international union commits an unfair labor practice by causing its affiliated local unions to "impose extraneous non-bargaining unit considerations into the collective-bargaining process." *Paperworkers Local 620 (International Paper Co.)*, 309 NLRB 44, 44 (1992). *See also Kobell v. United Paperworkers International Union*, 965 F.2d 1401, 1407 (6th Cir. 1992). Given that rule, the alleged wrongful conduct that is the subject of the Third Amended Complaint's "interference/inducement of breach of contract" claim against the IBT would arguably constitute an unfair labor practice for essentially the same reasons advanced by the NLRB General Counsel in his unfair labor practice complaint against Local 287. Once again, Granite Rock did not allege that the IBT had committed an unfair labor practice in the charges filed by the Company.

In sum, the problem for Granite Rock is not the lack of available federal remedies for wrongful international interference in the collective bargaining relationship between an employer and the international's local-union affiliate but that Granite Rock lacks any evidentiary basis for invoking those remedies in the circumstances presented by this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

LYNN K. RHINEHART
JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337

Of Counsel:

LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
SEP 2 2009
OFFICE OF THE CLERK

No. 08-1214

In the Supreme Court of the United States

GRANITE ROCK COMPANY,
Petitioner,
v.
INTERNATIONAL BROTHERHOOD OF TEAMSTERS & TEAMSTERS LOCAL 287,
Respondents.

On a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

AMICUS BRIEF OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. IN SUPPORT OF PETITIONER

Michael E. Kennedy
General Counsel
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.
2300 Wilson Boulevard, Suite 400
Arlington, VA 22201
703-837-5335

William Bevan III
David J. Bird*
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
412-288-3131

Counsel for Amicus Curiae The Associated General Contractors of America, Inc.
*Counsel of Record

September 3, 2009

BOTH SIDES

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. As This Court Consistently Has Recognized, § 301(a) Grants the Federal Courts Jurisdiction Over All "Suits For Violation Of Contracts Between An Employer And A Labor Organization." 7

II. Federal Courts Have And Should Exercise Their Jurisdiction To Decide A Case That A Signatory To A Labor Agreement Brings Against A Non-Signatory For Directly, Intentionally, And Improperly Causing A Violation Of That Agreement. 12

A. In *Wilkes-Barre*, The Third Circuit Correctly Held That A Signatory Could Bring An Action Under § 301(a) Against A Non-Signatory For Directly,

Intentionally, And Improperly Causing A Violation Of A Labor Agreement. 12

B. *Wilkes-Barre* Fully Comports With The Drafting History Of § 301(a). 17

C. *Wilkes-Barre* Fully Comports With This Court's Recent Rulings, Which Recognize That The Scope Of § 301(a) Depends On The Substance Of The Claim Being Asserted, And Not Whether The Defendant Personally Signed The Agreement At Issue Or The Claim Sounds In "Contract." 19

D. Pursuant To § 301(a), Federal Courts Often Fashion Federal Common Law Remedies To Protect Contract Rights, Redress Violations Of Labor Agreements, And Effectuate Federal Labor Policies, Without Regard To Whether A Defendant Is A Signatory To The Agreement Or The Claim Sounds In "Contract." 25

E. The Ninth Circuit's Ruling Does Not Comport With The Text Of § 301(a), This Court's Precedents, Or Other Judicial Decisions, And It Threatens To Create A Wholly Unnecessary And Ill-Advised "No-Man's Land" In National Labor Law. 31

III. In Fashioning A Federal Remedy Under § 301(a), Federal Courts Should Consider The Nature Of The Problem That Arises When A Non-Signatory Like The International Union Causes A Violation Of A Contract, As Well As The National Labor Policies Embedded in § 301(a), And Other Well-Settled Principles Of Common Law. 36

CONCLUSION 39

TABLE OF AUTHORITIES

Page

Cases

Allis-Chalmers Corp. v. Lueck,
471 U.S. 202 (1985) ..... passim

American Federation of Television and Radio Artists, AFL-CIO v. WJBK-TV (New World Communications of Detroit, Inc.),
164 F.3d 1004 (6th Cir. 1999) 29

Anderson v. Aset Corp.,
416 F.3d 170 (2d Cir. 2005) 34

Associated General Contractors of America v. Metropolitan Water Dist. of S. California,
159 F.3d 1178 (9th Cir. 1998) 4

Atkinson v. Sinclair Refining Co.,
370 U.S. 238 (1962) ..... passim

Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists,
390 U.S. 557 (1968) 10, 11

Bartholomew v. AGL Resources, Inc.,
361 F.3d 1333 (11th Cir. 2004) 34

Beneficial Nat. Bank v. Anderson,
539 U.S. 1 (2003) 10

Bowers v. Ulpiano Casal, Inc.,
393 F.2d 421 (1st Cir. 1968) 30

Brannan Sand & Gravel Co.,
289 NLRB 977 (1988) 3

Brown v. Pro Football, Inc.,
518 U.S. 231 (1996) 4

Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.,
507 U.S. 218 (1993) 4

Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.,
690 F.2d 489 (5th Cir. 1982) 27, 28, 30

Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100,
421 U.S. 616 (1975) 3

Glens Falls Building & Construction Trades Council,
350 NLRB 417 (2007) 4

Granite Construction Co.,
330 NLRB 205 (1999) 4

Int'l Union, United Mine Workers of America v. Covenant Coal Corp.,
977 F.2d 895 (4th Cir. 1992) 29

John Deklewa & Sons,
282 NLRB 1375 (1987), *enforced sub nom. International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local 3 v. NLRB*,
843 F.2d 770 (3d Cir. 1988) 3

Local 472 of the United Ass'n of Journeymen and Apprentices of Plumbing and Pipefitting Industry of U.S. and Canada v. Georgia Power Co.,
684 F.2d 721 (11th Cir. 1982)..... 16

Loss v. Blankenship,
673 F.2d 942 (7th Cir. 1982)..... 30

Mattis v. Massman,
355 F.3d 902 (6th Cir. 2004)..... 34

Mesa Verde Constr. Co. v. Northern California Dist. Council of Laborers,
861 F.2d 1124 (9th Cir. 1988)..... 3

Nedd v. UMW,
556 F.2d 190 (3d Cir. 1977) 14

New York State Chapter, Inc., AGC v. New York State Thruway Authority,
666 N.E.2d 185 (N.Y. 1996)..... 4

NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.,
691 F.2d 1117 (3d Cir. 1982) 27

NLRB v. Town & Country Elec., Inc.,
516 U.S. 85 (1995) 4

Oberkramer v. IBEW-NECA Service Center, Inc.,
151 F.3d 752 (8th Cir. 1998) 34

Painting and Decorating Contractors Ass'n v. Painters and Decorators Joint Comm., Inc.,
707 F.2d 1067 (9th Cir. 1983) 28

Plumbers and Pipefitters v. Plumbers and Pipefitters, Local 334,
452 U.S. 615 (1981) 21

Serv., Hosp., Nursing Home & Public Employees Union, Local No. 47 v. Commercial Prop. Servs., Inc.,
755 F.2d 499 (6th Cir. 1985) 29, 30

Smith v. Evening News Ass'n,
371 U.S. 195 (1962) .....passim

Sprewell v. Golden State Warriors,
266 F.3d 979, *amended on denial of reahearing*, 275 F.3d 1187
(9th Cir. 2001) 34

South Prairie Const. Co. v. Local No. 627, Int'l Union of Operating Engineers, AFL-CIO, 425 U.S. 800 (1976) 27

Steinbach v. Dillon Companies, Inc., 253 F.3d 538 (10th Cir. 2001) 34

Steiny & Co., Inc., 308 NLRB 1323 (1992) 3

Teamsters Local Union No. 30 v. Helms Express, Inc., 591 F.2d 211 (3d Cir. 1979) 14

Teamsters Nat. Automotive Transporters Industry Negotiating Committee v. Troha, 328 F.3d 325 (7th Cir. 2003) 29

Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) 9, 15, 16, 23, 24

Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448 (1957) ..... passim

Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Automobile, Aerospace, Agricultural Implement Workers of America, Int'l. Union, 523 U.S. 653 (1998) ..... passim

United Food & Com. Workers Union, Local No. 1564 v. Quality Plus Stores, Inc., 961 F.2d 904 (10th Cir. 1992) 29

Whelan v. Colgan,
602 F.2d 1060 (2d Cir. 1979) 28

Wilkes-Barre Pub. Co. v. Newspaper Guild of Wilkes-Barre, Local 120,
647 F.2d 372 (3d Cir. 1981) .....passim

Wooddell v. International Brotherhood of Electrical Workers, Local 71,
502 U.S. 93 (1991) .....passim

Xaros v. U.S. Fid. and Guar. Co.,
820 F.2d 1176 (11th Cir. 1987)..... 16, 28

Statutes

Labor Management Relations Act,
§ 301(a), 29 U.S.C. § 185(a) .....passim

Rules

United States Supreme Court Rule 37.2 1

United States Supreme Court Rule 37.6 1

Other Authorities

H.R. 3020, 80th Cong. (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 31; 158 (1948) 17,

S. 1126, 80th Cong. (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 99; 226 (1948) 18

Restatement (Second) of Torts §§ 766, 767 38

Webster's New International Dictionary 984 (2d ed. 1950) (def. 7) 25

INTEREST OF *AMICUS CURIAE*[1]

The Associated General Contractors of America, Inc. ("AGC") is among the largest and oldest of the trade associations in the construction industry and by far the most diverse. It was founded in 1918 at the express request of President Woodrow Wilson, and today it has 95 chapters and more than 33,000 members across the country. Among its members are more than 7,500 general construction contractors, 12,500 specialty contractors, and 13,000 material suppliers and service providers. Its members undertake a great variety of construction projects, including commercial buildings, apartment buildings, condominiums, factories, warehouses, highways, bridges, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects and defense facilities. AGC members also install utilities and otherwise prepare sites for the construction of single-family homes. Most

---

[1] Pursuant to Rule 37.2, counsel for the amicus certifies that counsel of record for all parties received timely notice that the amicus intended to file an amicus curiae brief in support of the Petitioner at least ten days prior to the due date for the amicus curiae brief. Letters reflecting the parties' consent to the filing of this amicus curiae brief are being lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for the amicus states that no counsel for a party authored this brief in whole or in part and that no person other than the amicus, its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

AGC members are closely held and remain small, but others are publicly traded and among the nation's largest corporations.

AGC spans the entire spectrum of labor-management relations in the construction industry. While many AGC members are open shop companies, many others are union firms that (either individually or as members of multi-employer bargaining units) negotiate and work under collective bargaining agreements. Still other members are hybrids, performing some work open shop and other work (perhaps in other parts of the country) under collective bargaining agreements. The unions with which AGC members regularly deal include the local and international unions representing carpenters, laborers, ironworkers, cement masons, operating engineers and teamsters.

Most of AGC's chapters and all of the union contractors among AGC's members have a direct and immediate interest in the nature and scope of the federal common law remedies available to them under § 301(a) of the Labor Management Relations Act ("LMRA").

Collective bargaining in the construction industry often involves many more than the two parties to the ultimate agreement, including parties (like the international union in this case) that have a significant interest in the agreement but do not hold specific rights or obligations under the agreement. Likewise, the implementation of a collective bargaining agreement often involves both the signatories to the agreement and non-signatories who have an

interest in the agreement and the power to cause a violation of the terms of the agreement.

Like *all* union contractors, AGC members who negotiate and work under labor agreements rely upon them and have a strong interest in ensuring that both signatories and non-signatories are accountable for culpable conduct that causes a violation of signatories' contractual rights. AGC believes that § 301(a) provides federal courts with jurisdiction and authority to decide a claim against a non-signatory under the properly pleaded facts of this case.[2]

On many prior occasions, AGC has sought to help both the courts and the National Labor Relations Board shape the unique body of federal law governing labor-management relations in the construction industry. As an amicus curiae, AGC participated in *Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975); *John Deklewa & Sons*, 282 NLRB 1375 (1987), *enforced sub nom. International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988); *Brannan Sand & Gravel Co.*, 289 NLRB 977 (1988); *Mesa Verde Constr. Co. v. Northern California Dist. Council of Laborers*, 861 F.2d 1124 (9th Cir. 1988); *Steiny & Co., Inc.*, 308 NLRB 1323 (1992);

---

[2] While AGC and its members have an interest in both of the questions presented, they have a much greater interest in the second question and therefore devote this brief entirely to that question.

Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218 (1993); *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85 (1995); *New York State Chapter, Inc., AGC v. New York State Thruway Authority*, 666 N.E.2d 185 (N.Y. 1996); *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996); *Associated General Contractors of America v. Metropolitan Water Dist. of S. California*, 159 F.3d 1178 (9th Cir. 1998); *Granite Construction Co.*, 330 NLRB 205 (1999); and *Glens Falls Building & Construction Trades Council*, 350 NLRB 417 (2007). As a broad association, representing both the open shop and the union sectors of the construction industry, AGC is in a unique position to assist this Court with its consideration of the pending Petition.

SUMMARY OF ARGUMENT

In keeping with this Court's prior opinions, which have consistently construed § 301(a) to authorize and require the federal courts to fashion a body of federal common law to deter and redress violations of labor agreements, the Court should hold that a signatory to a labor agreement may bring an action under § 301(a) against a non-signatory, including one possessed of neither rights nor obligations under the agreement, if in fact that person or entity directly, intentionally, and improperly caused a violation of the agreement.

Such a ruling would be consistent with the text of § 301(a), which plainly grants federal courts the power to hear all "[s]uits for violation of contracts between an employer and a labor

organization representing employees in an industry affecting commerce." It also would flow logically and naturally from this Court's jurisprudence construing § 301(a) broadly to give federal courts the power and responsibility to craft a body of federal common law recognizing such causes of action and providing such remedies as the federal courts find necessary to achieve Congress's paramount goals of (1) uniformity in the construction and enforcement of collective bargaining agreements, (2) effective protection of the rights and expectations of parties to such agreements, and (3) both deterrence of and redress for conduct that violates such agreements.

The Ninth Circuit's contrary decision to deny Petitioner a federal remedy under § 301(a) against the International Brotherhood of Teamsters ("IBT") does not withstand analysis under this Court's prior precedents. The Ninth Circuit's opinion holds that § 301(a) recognizes a cause of action only against signatories to such agreements and others possessing express rights or obligations under such agreements. This narrow reading of § 301(a) has no basis in the text of the statute or in this Court's jurisprudence, and it threatens to leave parties to labor agreements (like the Petitioner and many of AGC's members) without a meaningful remedy under either federal or state law for misconduct that directly and intentionally contravenes a collective bargaining agreement.

More than fifty years ago, in *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1957), the Court stated that complaints for

alleged violations of collective bargaining agreements should "be solved by looking at the policy of [§ 301(a)] and fashioning a remedy that will effectuate [the collective bargaining] process." Wisely, the Court added that "the nature of the problem" should govern "[t]he range of judicial inventiveness." *Id.* at 456-57.

In the years since *Lincoln Mills*, the Court has continued to develop a uniform body of federal common law under § 301(a) to facilitate collective bargaining and to ensure that the resulting agreements have their intended effect. That same common law approach strongly supports a § 301(a) action against a non-signatory under the facts of this case, where the complaint alleges that the non-signatory: (1) actively participated in the negotiation of a collective bargaining agreement; (2) knew of the existence of the agreement; (3) possessed the power to cause a violation of the agreement; (4) intentionally and improperly exercised that power, and directly caused a violation of the agreement; and (5) was motivated by a desire to acquire rights and benefits primarily if not exclusively for itself. To "exclude" such a claim from the "ambit of §301(a)" would "stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantitive law." *Smith v. Evening News Ass'n*, 371 U.S. 195, 200-01 (1962).[3]

---

[3] Of course, finding a cause of action under § 301 is quite different from finding liability. Even if this Court found a

Continued on following page

ARGUMENT[4]

I. As This Court Consistently Has Recognized, § 301(a) Grants the Federal Courts Jurisdiction Over All "Suits For Violation Of Contracts Between An Employer And A Labor Organization."

Section 301(a) of the LMRA provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Continued from previous page

cause of action, a non-signatory would retain the right to interpose an appropriate defense. For example, a defendant could contend that no agreement was formed, that the agreement was repudiated, that no actual violation of an agreement occurred, that the defendant did not act directly or with specific intent to cause a violation of the agreement, or that the defendant's conduct was not improper under the circumstances.

[4] AGC agrees with and relies upon the Statement of the Case and Procedural History set forth in the Brief of the Petitioner.

29 U.S.C. § 185(a).

By its terms, § 301(a) grants the federal courts subject matter jurisdiction over all "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce." *Id.* Consistent with the statute, this Court's precedents make it clear that § 301(a) also requires the federal courts to develop and enforce a body of federal common law consistent with the policies that led Congress to enact that provision.

In *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1957), the Court found that § 301(a) directs the federal courts to "fashion" a body of federal common law to address and remedy disputes arising out of labor contracts. *Id.* at 456-57; *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985) (citing *Lincoln Mills*). As the Court explained in *Lincoln Mills*, this mandate flows directly from the broad terms of Section 301 and the LMRA. "It is not uncommon for federal courts to fashion federal law where federal rights are concerned." 353 U.S. at 456-57. "The range of judicial inventiveness will be determined by the nature of the problem." *Id.*

While *Lincoln Mills* makes clear that federal courts are to develop and apply federal substantive law and remedies under § 301(a), *Lincoln Mills* also recognizes that federal courts may consider and draw upon legal concepts, rights, defenses, and remedies commonly recognized in state law, to the extent that those

state law concepts are "compatible with the purpose" of § 301(a) and "effectuate" federal labor policies. *Id.* at 457.

Building on *Lincoln Mills*, in *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962), this Court held that a labor agreement between an employer and a union *must* be construed and enforced according to principles of federal common law developed under § 301(a), not state rules of decision. Accordingly, the Court concluded § 301(a) preempts any state law that would purport to govern the construction or enforcement of agreements between an employer and a labor union. *Id.* at 103-04.

That same year, in *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 247 (1962), the Court reviewed an action that an employer had brought against members of a union with which the employer had a collective bargaining agreement, asserting a state law claim of tortious interference with that employer's contractual relationship with the union. The Court held that the state law tortious interference claim was preempted by § 301(a) and had to be dismissed. *Id.* Without dwelling on whether individual defendants were signatories to the labor agreement at issue, *Atkinson* held that the plaintiff's claim of tortious interference against them was one governed "by the national labor relations law which Congress commanded this Court to fashion under § 301(a)." 370 U.S. at 247.

Six months later, in *Smith v. Evening News Ass'n*, 371 U.S. 195, 200-01 (1962), the Court

held that an individual union member could bring an action against his employer under § 301(a) for breach of a collective bargaining agreement, even though the individual was not a signatory to the agreement at issue. In reaching this conclusion, the Court rejected a narrow construction of § 301(a) that would have limited the federal jurisdiction and federal common law remedies to suits "between" the employer and the labor union that had signed the agreement at issue. *Id.* The Court reasoned that the term "between" in § 301(a) refers only to "contracts," not "suits." According to the Court, neither the "language" nor the "structure," nor the "legislative" history of § 301(a) supported a restrictive reading of the statute based on a litigant's status as a signatory to the agreement at issue. *Id.* Indeed, such a restrictive reading would "frustrate rather than serve the congressional policy expressed in that section." *Id.*

In *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists*, 390 U.S. 557, 560 (1968), the Court took the next in its series of logical steps, holding that § 301(a) provides the *exclusive* remedy for any claim based on an alleged violation of a collective bargaining agreement, and more precisely, that a state law action could be removed to federal court based on the doctrine of "complete preemption" if the state law action sought relief for an alleged violation of a collective bargaining agreement. *See also Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 6-7 (2003) (discussing *Avco* and other cases where federal statutes provide exclusive

federal remedies that completely preempt state law causes of action).

Together, these seminal decisions establish that § 301(a): (1) must be construed broadly to effectuate congressionally mandated policies in the field of labor relations; (2) provides federal courts with unique authority and responsibility to develop a federal common law concerning violations of labor agreements; (3) preempts state law and causes of action that would otherwise govern the construction or enforcement of such agreements, including any state law or cause of action for tortious interference with a labor agreement; and (4) provides both a federal forum and remedies for suits alleging violations of labor agreements, without regard to whether the litigants are signatories, and without regard to whether the claim sounds in "contract" or "tort." *Atkinson*, 370 U.S. at 247 (§ 301(a) encompasses actions that sound in "tort" under state or common law); *Smith*, 371 U.S. at 200-01 (§ 301(a) governs actions between non-signatories and signatories without regard to whether the action would sound in contract under state or common law).

II. Federal Courts Have And Should Exercise Their Jurisdiction To Decide A Case That A Signatory To A Labor Agreement Brings Against A Non-Signatory For Directly, Intentionally, And Improperly Causing A Violation Of That Agreement.

In keeping with the plain meaning of § 301(a), this Court's prior precedents, and the well-settled policies that have long animated that key provision of the Labor Management Relations Act, the Court should hold that a signatory to a labor agreement may bring a claim under § 301(a) against a non-signatory for directly, intentionally, and improperly causing a violation of that agreement, whether or not the defendant assumed any formal rights or obligations under the agreement.

A. In *Wilkes-Barre*, The Third Circuit Correctly Held That A Signatory Could Bring An Action Under § 301(a) Against A Non-Signatory For Directly, Intentionally, And Improperly Causing A Violation Of A Labor Agreement.

Almost thirty years ago, in *Wilkes-Barre Pub. Co. v. Newspaper Guild of Wilkes-Barre, Local 120*, 647 F.2d 372, 377, 379-81 (3d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982), the Third Circuit recognized that the negotiation and implementation of a collective bargaining

agreement often involves many more than the two parties to that agreement, including parties (like the international union in this case) who are not signatories to the agreement, and do not hold specific rights or obligations under the agreement, but who nevertheless have an unusually close relationship to one of the parties, significant and unique interests of their own, and little, if any, reluctance to take any action they deem necessary to advance their interests. Consistent with *Lincoln Mills*, 369 U.S. at 103-04 the Third Circuit recognized that this "problem" in the making and enforcement of collective bargaining agreements could be "solved" by allowing an action under § 301(a) against a non-signatory who allegedly caused a violation of the agreement intentionally and improperly.

The facts of *Wilkes-Barre* merit careful review because they are substantially similar to the circumstances of this case. In *Wilkes-Barre*, a newspaper publisher brought an action against a local union, an international union, individual union members, and a competitor that the unions and their members had created. The publisher asserted: (1) a claim against the local union for breach of its collective bargaining agreement with the publisher; and (2) a claim against the international union and the remaining defendants for causing the local union to violate the agreement.

In relevant part, the Third Circuit held that the publisher had stated a valid claim under § 301(a) against the international union and the competitor for violations of the labor agreement,

though neither one had signed the agreement. *Id.*[5]

The Third Circuit began its analysis of the issue by referring, first, to the text of § 301(a), and second, to this Court's decision in *Atkinson v. Sinclair Refining Co.* *Id.* The Third Circuit noted that § 301(a) completely preempts a state law claim for tortious interference and that any such claim is completely governed "by the national labor relations law which Congress commanded this Court to fashion under § 301(a)." *Id.* at 377 (quoting *Atkinson*, 370 U.S. at 247).

With "those general principles in mind," the court then examined two of its prior decisions and this Court's decision in *Smith v. Evening News Ass'n*, 371 U.S. at 200-01. *See* 647 F.2d at 377-81.[6] Consistent with the manner in which *Atkinson*, *Smith*, and numerous other cases had read § 301(a), the Third Circuit then held that § 301(a) provides federal subject matter

---

[5] The court affirmed the district court order dismissing the publisher's claims against individual union members, holding that these individual defendants were entitled to statutory immunity from suit under the LMRA. *Id.*

[6] In *Wilkes-Barre*, the newspaper publisher argued that whether it was entitled to a federal remedy under the circumstances had been decided affirmatively in *Nedd v. UMW*, 556 F.2d 190, 196 (3d Cir. 1977), and the defendants argued the issue was answered negatively in *Teamsters Local Union No. 30 v. Helms Express, Inc.*, 591 F.2d 211 (3d Cir. 1979). However, the Third Circuit found neither case dispositive. 647 F.2d at 379.

jurisdiction over *any* suit that seeks remedies for a violation of an agreement between an employer and a labor union. *Wilkes-Barre*, 647 F.2d at 377-81.

As the court explained in its opinion, *nothing* in either the text of the statute or this Court's jurisprudence suggests that § 301(a) jurisdiction should be limited to those suits that "sound" in "contract" and are brought against a signatory or another formal party to a labor agreement. *Id.* As *Wilkes-Barre* succinctly stated, jurisdiction under § 301(a) does not turn on the status of litigants as signatories to an agreement or on the "label" attached to a cause of action. Rather, the "issue" is "whether the remedy sought may require that the court ... interpret a collective bargaining agreement." *Id.* "All suits for violation of collective bargaining agreements are governed by federal law, because Congress intended that the scope of obligation in labor contracts in or affecting interstate commerce be uniform." *Id.* (citing *Lucas Flour*). "It is the need for national uniformity in determining the scope of obligation ... that determines whether a federal standard is applicable, and which determines, incidentally [whether there is] federal subject matter jurisdiction." *Id.*

Because a "violation" of the newspaper publisher's collective bargaining agreement would be an "essential element" of any action against the international union and other non-signatories, the Third Circuit reasoned that the claim could not arise under state law and had to arise under the federal common law that § 301(a) authorizes and requires federal courts

to develop. "A holding that tortious interference with a collective bargaining agreement is not a matter governed by federal law would leave open the possibility of lack of uniformity in the scope of obligation which the Court in *Lucas Flour* sought to prevent." *Id.*

According to the Third Circuit, it was especially appropriate to hear claims for tortious interference with a collective bargaining agreement in federal court under § 301(a) because such claims involve the "protection of a property interest [in] a labor contract which has its being in and draws its vitality from the federal common law of labor contracts." *Id.* at 381.[7]

---

[7] In *Local 472 of United Ass'n of Journeymen and Apprentices of Plumbing and Pipefitting Industry of U.S. and Canada v. Georgia Power Co.*, 684 F.2d 721, 725 & n.1 (11th Cir. 1982), the Eleventh Circuit likewise concluded that § 301(a) authorizes courts to hear a claim for violation of a labor agreement brought against a defendant who did not sign the agreement at issue but who allegedly caused its breach. However, the Eleventh Circuit appears to have abrogated *Georgia Power* without explanation in *Xaros v. U.S. Fid. and Guar. Co.*, 820 F.2d 1176, 1181 (11th Cir. 1987), where the court held § 301(a) jurisdiction did not extend to claims against non-signatories to an agreement who allegedly caused a breach.

B. *Wilkes-Barre* Fully Comports With The Drafting History Of § 301(a).

Wilkes-Barre was in keeping with the legislative history of § 301. As originally passed by the House, H.R. 3020 provided (in Section 302) for the following:

> Equal Responsibility and Liability
>
> Sec. 302. (a) Any action for or proceeding involving a violation of an agreement between an employer and a labor organization or other representative of employees may be brought *by either party* in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, if such agreement affects commerce, or the court otherwise has jurisdiction of the cause.

H.R. 3020, 80th Cong., at 64 (1947) (emphasis added), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 31, 94; 158, 221 (1948).

A similar provision was included in the bill that the Senate passed (S. 1126). The Senate provision on contract enforcement provided as follows:

> Suits By And Against Labor Organizations
>
> Sec. 301. (a) Suits for violation of contracts concluded as the result of collective bargaining between an

> employer and a labor organization representing employees in an industry affecting commerce as defined in this Act may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

S. 1126, 80th Cong., at 53 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 99, 151; 226, 279 (1948).

When the final bill emerged from the Conference Committee, the relevant language approximated the language included in the Senate bill. Significantly, the Conference Committee removed the reference to suits "being brought by either party," removing doubt that Congress did not intend suits brought under § 301 to be limited to suits between signatories. Together, the text and drafting history of the statute defeat any argument that its drafters intended to confine suits to signatories.

C. *Wilkes-Barre* Fully Comports With This Court's Recent Rulings, Which Recognize That The Scope Of § 301(a) Depends On The Substance Of The Claim Being Asserted, And Not Whether The Defendant Personally Signed The Agreement At Issue Or The Claim Sounds In "Contract."

To be sure, this is a case of first impression in this Court. Deciding this case in favor of the Petitioner should not, however, trouble this Court, as it would be entirely consistent with the Court's prior rulings on § 301(a). Indeed, Judge Gibbons' decision in *Wilkes-Barre* is faithful to the text and purpose of § 301(a) as both Congress and this Court have articulated them. The Third Circuit's reasoning in *Wilkes-Barre* was sound when written (nearly thirty years ago), and it remains sound today.

The terms of § 301(a) have not changed since *Wilkes-Barre* was decided and those terms still give the federal courts the power—and obligation—to decide all "[s]uits" brought "for" a "violation" of a collective bargaining agreement between an employer and a labor organization representing employees in an industry affecting commerce. What the Third Circuit recognized in *Wilkes-Barre* about § 301(a) is undoubtedly still true today: *nothing* in the text of the statute suggests that § 301(a) jurisdiction should be limited to those "suits" that "sound" in "contract"

or are brought against a signatory or other formal party to a labor agreement.

In the years since *Wilkes-Barre*, this Court has rendered a number of decisions on § 301(a), but none casts even the slightest doubt on (1) the Third Circuit's assessment of the "problem" that can arise when a non-signatory has an interest in an agreement and the power to cause a violation of that agreement; or (2) the remedy that the Third Circuit fashioned pursuant to § 301(a) and this Court's mandate in *Lincoln Mills* to deter and redress that problem.

To the contrary, the jurisprudence of this Court since *Wilkes-Barre* strongly supports a construction of § 301(a) that would allow a signatory to a labor agreement to bring an action against a non-signatory whose *intentional* and *improper* conduct has caused a violation of that agreement, without regard to any formal rights or obligations that the non-signatory may or may not have under the agreement.

Repeatedly, this Court has recognized that neither the scope of § 301(a) nor the merit of providing a federal remedy under the statute depends on (1) whether a claim sounds in contract, (2) whether a plaintiff or defendant is signatory to the collective bargaining agreement at issue, or (3) whether a party assumed any formal rights or obligations under the agreement. Rather the Court repeatedly has ruled that the scope of § 301(a) and the merit of providing a federal remedy depend upon the nature and substance of the claim being asserted and the relief being requested.

The Court's decision in *Wooddell v. International Brotherhood of Electrical Workers, Local 71*, 502 U.S. 93, 99-103 (1991), is a perfect example of the Court's modern construction of federal remedies under § 301(a). In *Wooddell*, a local union member brought suit under § 301(a) against both his local union and its officers, alleging violations of the union's constitution and by-laws (which were labor contracts covered by §301(a), and the Court's decision in *Plumbers and Pipefitters v. Plumbers and Pipefitters, Local 334*, 452 U.S. 615, 624 (1981)).

Neither the named plaintiff nor the union officials named as defendants had personally signed any of the labor agreements at issue. Given these facts, the defendants argued in this Court that § 301(a) jurisdiction only extended to suits between the parties to a labor agreement and did not extend to suits involving third-parties. The Court emphatically rejected that argument, noting that *Smith v. Evening News* "is to the contrary." 502 U.S. at 100-01. Following *Smith*, *Wooddell* reasoned that the individual plaintiff could bring suit under § 301(a), even though he was not a signatory to the agreement at issue, because the purpose of the plaintiff's suit was to redress a violation of rights derived from a labor agreement protected by national labor law against the parties allegedly culpable for the violation. *Id.*

Similarly, the Court's decision in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209-13, 220-21 (1985), demonstrates that the scope of § 301(a) does not depend on whether a claim sounds in "contract" or "tort" or whether the

claim is brought against a party who signed or assumed rights or obligations under the labor agreement at issue. In *Allis-Chalmers*, an employee brought a tort action under state law against his employer and an insurance company that administered an insurance plan that a collective bargaining agreement required. The employee alleged that the employer and the administrator had acted in bad faith when handling his insurance claim. *Id.* The defendants argued that the employee's action was preempted by § 301(a) because the payments for the insurance plan were the subject of a collective bargaining agreement between the employer and employee's union. The Wisconsin Supreme Court disagreed, and held that the employee could pursue his action for bad faith, notwithstanding § 301(a), because Wisconsin state law recognized an independent "tort" for bad faith that was "distinguishable" from any claim for breach of contract. *Id.* at 207-08. Moreover, the Wisconsin court ruled the employee could pursue this independent tort action against both his employer and the insurance company administrator (who was not a party to the underlying labor agreement).

This Court reversed the Wisconsin Supreme Court's ruling and held that the employee's tort claims against his employer and the third-party insurance company fell within the ambit of § 301(a). Although the employee's claims sounded in tort and were brought against both a signatory and a non-signatory to the underlying labor agreement, the Court had no difficulty concluding that the employee's state law claims

against both defendants must be treated either as § 301(a) claims or dismissed altogether as preempted by federal labor law under § 301(a). *Id.* at 220-21.

In the words of the Court, "[i]f the policies that animate § 301 are to be given their proper range, ... the pre-emptive effect of § 301 must extend beyond suits alleging contract violations.... [Q]uestions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether the questions arise in the context of a suit for *breach of contract* or in a suit alleging *liability in tort.* Any other result would elevate form over substance and allow parties to evade the requirements of § 301...." *Id.* at 210-11 (emphasis added) (noting that the employee's claim had to be dismissed, even if treated as a claim under § 301(a), because the employee had failed to follow the requisite contractual grievance procedures).

"[W]hen resolution of a state-law [tort] claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim ... or dismissed as pre-empted by federal labor-contract law." *Id.* at 220. "The requirements of § 301 as understood in *Lucas Flour* cannot vary with the name appended to a particular cause of action." *Id.* "Unless federal law governs that [tort] claim, the meaning of the health and disability-benefit provisions of the labor agreement would be

subject to varying interpretations, and the congressional goal of a unified federal body of labor-contract law would be subverted." *Id.*

The guiding principle for all of these cases—from *Lincoln Mills*, *Lucas Flour*, *Atkinson*, and *Smith* to *Allis-Chalmers* and *Wooddell*—is that § 301(a) extends to any action intended to rectify a violation of a labor contract allegedly caused by the improper conduct of the named defendant. Such actions must arise under federal law in order to ensure that rights and obligations under labor agreements are uniformly construed according to federal law and adequately protected and enforced in accordance with the federal policies that led Congress to enact § 301(a). *See Atkinson,* 370 U.S. at 247; *Smith*, 371 U.S. at 200-01; *Wooddell*, 502 U.S. at 99-103; *Allis-Chalmers*, 471 U.S. at 209-13.

This Court's decision in *Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Automobile, Aerospace, Agricultural Implement Workers of America, Intern'l Union*, 523 U.S. 653 (1998) underscores that point. In *Textron*, a union sued an employer under § 301(a) alleging that the employer had fraudulently induced the union to sign a collective bargaining agreement. The issue before the Court was whether the scope of § 301(a) "includes suits alleging that a contract is invalid." *Id.* at 656.

The Court ruled that § 301(a) did not extend to a "suit" alleging that a contract is "invalid." In its opinion, the Court noted that the plain language of § 301(a) provides courts with authority only over "[s]uits for violation of

contracts." Construing that statutory phrase in the "context" of the LMRA, the Court ruled that a suit "for violation of contract" is one filed "*because a contract has been violated*." *Id.* at 657 (emphasis in original). In "context," the Court wrote, "the word 'for' has an unmistakably backward-looking connotation, *i.e.*, '[i]ndicating the cause, motive, or occasion of an act, state, or condition; hence, because of; on account of; in consequence of; as the effect of; for the sake of....'" *Id.* (quoting Webster's New International Dictionary 984 (2d ed. 1950) (def. 7)). Thus, according to *Textron*, "'[s]uits for violation of contracts' under §301(a) are not suits that claim a contract is invalid, but suits that claim a contract has been violated." *Id.* *See* above pp. 4-7 and below pp. 36-39 (noting that a defendant to an action brought under § 301(a) may, however, interpose an appropriate defense to such an action).

D. Pursuant To § 301(a), Federal Courts Often Fashion Federal Common Law Remedies To Protect Contract Rights, Redress Violations Of Labor Agreements, And Effectuate Federal Labor Policies, Without Regard To Whether A Defendant Is A Signatory To The Agreement Or The Claim Sounds In "Contract."

In keeping with the plain meaning of § 301(a), this Court's precedents, and the well-settled policies embedded in the statute, federal

courts across the nation routinely fashion federal common law remedies that protect parties' rights, redress violations of labor contracts, and effectuate federal labor policies embedded in the statute, without regard to whether a defendant is a signatory to the agreement at issue, and without regard to the characterization of the claim as "contract" or "tort." Judicial recognition of Petitioner's action against the IBT is completely consistent with this common law approach to litigation under § 301(a).

For example, federal courts routinely hear cases under § 301(a) against defendants who did not sign the labor agreement at issue, based on the "single employer," "joint employer," and "alter ego" doctrines.

While these doctrines function differently,[8] the National Labor Relations Board (operating under a grant of regulatory authority in the National Labor Relations Act), and the federal courts (operating pursuant to Congress's directive to fashion a body of federal common law under § 301(a) of the construction and enforcement of labor agreements), have fashioned them for the singular purpose of ensuring that the NLRB and the courts are in a position to provide relief that appropriately and

---

8 Under the "single employer" doctrine, two companies may be bound by a union contract signed by one of them (and thus subject to suit under § 301(a)) if they are sufficiently integrated to be deemed a "single employer" and if the employees of each constitute a single bargaining unit. Under the "alter ego" doctrine, a non-signatory may be deemed an alter ego of a signatory if a court finds that an employer has attempted to evade its obligations by setting up a new company, engaging in a sham transaction, or making a technical change in operations. The "joint employer" doctrine recognizes that two or more separate employers can exert significant control over the same employees requiring joint compliance with applicable legal rights and obligations. *See, e.g., South Prairie Const. Co. v. Local No. 627, Int'l. Union of Operating Engineers, AFL-CIO*, 425 U.S. 800 (1976) (single employer doctrine); *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1121 (3d Cir. 1982) (joint employer doctrine); *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 504-05 (5th Cir. 1982)(single employer and alter ego doctrines).

meaningfully effectuates Congress's paramount goals of (1) ensuring that collective bargaining agreements are uniformly construed and enforced, (2) protecting the rights and expectations of parties to these agreements, and (3) deterring and redressing conduct that violates collective bargaining agreements. *See, e.g., Pratt-Farnsworth*, 690 F.2d at 504-05.

Federal courts also have allowed actions under § 301(a) against a non-signatory under § 301(a) under circumstances where the non-signatory is alleged to have breached a specific right or obligation voluntarily assumed by it under the agreement at issue. For example, in *Whelan v. Colgan*, 602 F.2d 1060, 1061-62 (2d Cir. 1979), the Second Circuit held that § 301(a) provided federal jurisdiction over a suit against individual trustees of a welfare fund created by a labor agreement. Section 301(a) provided federal jurisdiction and a federal common law remedy for the individual trustees' alleged misconduct, even though the individual trustees were *not* signatories to the agreement *but* because the individual trustees allegedly breached a duty created by the labor agreement. *Id.*

Similarly, in *Painting and Decorating Contractors Ass'n v. Painters and Decorators Joint Comm., Inc.*, 707 F.2d 1067, 1071 (9th Cir. 1983), the Ninth Circuit held that § 301(a) provided the federal district court with authority to decide a suit brought against a joint committee that a collective bargaining agreement had called for the parties to establish, notwithstanding that the joint committee was not a signatory to the agreement at issue. The

court reasoned that jurisdiction was proper under § 301(a) because the agreement provided for the creation of the joint committee, gave the committee certain rights and obligations, and would have to be construed to litigate the dispute by the plaintiff against the committee. *Id.*

In a similar fashion, courts have held that § 301(a) provides a federal remedy against non-signatories to enforce arbitration subpoenas. *See Teamsters Nat. Automotive Transporters Industry Negotiating Committee v. Troha*, 328 F.3d 325, 329 (7th Cir. 2003) (upholding an action under § 301(a) to enforce an arbitration subpoena); *American Federation of Television and Radio Artists, AFL-CIO v. WJBK-TV (New World Communications of Detroit, Inc.)*, 164 F.3d 1004, 1007-09 (6th Cir. 1999) (same).[9]

---

[9] Those federal decisions that have held that § 301(a) does not provide a federal cause of action against a non-signatory who allegedly caused a violation of the terms of a labor agreement intentionally and improperly have done so based primarily on the view that a § 301(a) action is inherently narrow and depends on whether (1) the plaintiff's claim can be characterized as one that sounds in "contract" under state law and (2) the litigants are formal parties to the agreement at issue. *See Int'l Union, United Mine Workers of America v. Covenant Coal Corp.*, 977 F.2d 895, 897 (4th Cir. 1992); *United Food & Com. Workers Union, Local No. 1564 v. Quality Plus Stores, Inc.*, 961 F.2d 904, 906 (10th Cir. 1992); *Xaros v. U.S. Fid. and Guar. Co.*, 820 F.2d 1176, 1181 (11th Cir. 1987); *Serv., Hosp., Nursing Home & Public Employees Union,*

Continued on following page

In developing these federal remedies, the courts have not agonized over the nature of the claims being asserted or fretted about the *formal* status of parties vis-à-vis the contract. Rather, the courts have followed the flexible and realistic approach that *Lincoln Mills* and its progeny clearly contemplate crafting practical solutions to serious threats to contractually protected rights on a case-by-case basis. That is all that the Petitioner asks the Court to do based on the facts alleged here.

Continued from previous page

Local No. 47 v. Commercial Prop. Servs., Inc., 755 F.2d 499, 506 (6th Cir. 1985)); *Loss v. Blankenship*, 673 F.2d 942, 948 (7th Cir. 1982); *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 501 (5th Cir. 1982); *Bowers v. Ulpiano Casal, Inc.*, 393 F.2d 421, 423 (1st Cir. 1968). Such decisions however impose limitations on the scope of § 301(a) that do not comport with either the text of § 301(a) or this Court's prior precedents, and they undermine Congress's goal of ensuring that parties' right and obligations under labor agreements are uniformly construed and violations of such rights are deterred and redressed in a meaningful and realistic manner.

E. The Ninth Circuit's Ruling Does Not Comport With The Text Of § 301(a), This Court's Precedents, Or Other Judicial Decisions, And It Threatens To Create A Wholly Unnecessary And Ill-Advised "No-Man's Land" In National Labor Law.

Simply put, the issue in this case is whether, under *Lincoln Mills*, *Smith*, *Atkinson*, *Wooddell*, *Allis-Chalmers* and *Textron*, Petitioner's action against the IBT is an action "for" the violation of a contract between an employer and a labor organization representing employees in an industry affecting commerce. Plainly it is.

Treating the allegations in Petitioner's complaint as true, the record reveals: (1) that the IBT had a close relationship with the local union and actively participated in the negotiation of the agreement at issue; (2) that, shortly after the ratification of that agreement, the IBT caused the local union and its members to violate a no-strike clause included in the agreement when its agent, Rome Aloise, personally directed members of the local union to strike;[10] (3) that the IBT took this action for the purpose of coercing Granite Rock to grant the IBT express rights of indemnification in a side agreement, if not an amendment to the

---

[10] According to the Complaint, the resulting strike lasted more than two months and inflicted substantial financial damage on Granite Rock.

ratified agreement; and (4) that the IBT sought such rights for its own benefit, and not for the benefit of the local union that had ratified the agreement for the benefit of its members.[11]

These allegations state a claim "for" the violation of a collective bargaining agreement under *Lincoln Mills* and its progeny. Consistent with *Textron*, there can be no dispute that Petitioner filed this action against the IBT "*because a contract has been violated*." 523 U.S. at 657 (emphasis in original). Petitioner's action against the IBT hinges on its rights under the no-strike clause included in the underlying labor agreement and Petitioner's action against the IBT can be decided only via a judicial construction of that agreement under federal common law developed under § 301(a). Moreover, in keeping with *Textron*, Petitioner's action is "backward-looking" in that the action seeks to rectify a violation of a labor contract allegedly caused by the direct, intentional conduct of the IBT.

Nothing more is—or should be—required under the text of § 301(a) or this Court's

---

[11] Regardless of whether or not the IBT went so far as to "displace" the local union or whether it would be appropriate to characterize its conduct with precisely that term, the alleged facts (which this Court must assume to be true) establish that the IBT inserted itself into the bargaining process and then directly and intentionally caused a violation of the resulting agreement in order to obtain contract rights and benefits for itself.

precedents to bring the action within the scope of § 301(a).

Because the action falls within the scope of §301(a), it is axiomatic that a federal district court has both the power to decide the merits of Petitioner's claim and, if the claim is proven at trial, to fashion a federal remedy that redresses the violation of Petitioner's rights in a way that effectuates the Congressional policies embedded in the LMRA.

Notwithstanding the Ninth Circuit's ruling to the contrary, denying the Petitioner a federal remedy under § 301(a) against the IBT does not withstand analysis. The Ninth Circuit's opinion holds that § 301(a) actions may be brought against only those defendants who are alleged to be signatories to a labor agreement or to have assumed express rights or obligations under such an agreement. But, for all the reasons described (above pp. 7-11, 19-25), this limitation on the scope of a § 301(a) action has no basis in the text of the statute, the statute's drafting history, or in this Court's jurisprudence. Indeed, a ruling denying Petitioner's action would require this Court to depart from long-standing precedents requiring that § 301(a) be construed broadly to effectuate Congress's policies and require the Court to impose new limitations on the scope of § 301(a) not found in the statute.

Such a dramatic departure from past precedent and narrowing of the scope of § 301(a) would only serve to create confusion and uncertainty concerning the scope of § 301(a) and

federal labor law, necessitating a reassessment of decades of cases decided by this Court.

Furthermore, a ruling from this Court denying Petitioner a right to bring an action against the IBT under the circumstances of this case would seem to leave Petitioner and similarly situated parties to labor agreements (like many of AGC's members) without a meaningful cause of action under either federal or state law to deter or remedy intentional, improper conduct by non-signatories who have the power to affect the performance of a collective bargaining agreement and who intentionally and improperly cause a violation of the agreement. This is something that the Court repeatedly has recognized should not occur under § 301(a).

Following this Court's decisions in *Lincoln Mills* and *Atkinson*, the courts of appeals repeatedly have held that § 301(a) preempts the vast majority of state law claims for tortious interference with a labor agreement.[12]

---

12 *See, e.g., Anderson v. Aset Corp.*, 416 F.3d 170 (2d Cir. 2005) (§ 301(a) preempted state law claim against non-signatory defendant for tortious interference); *Bartholomew v. AGL Resources, Inc.*, 361 F.3d 1333 (11th Cir. 2004); *Mattis v. Massman*, 355 F.3d 902 (6th Cir. 2004) (same); *Sprewell v. Golden State Warriors*, 266 F.3d 979 (9th Cir. 2001) (same), *amended on denial of rehearing*, 275 F.3d 1187 (9th Cir. 2001); *Steinbach v. Dillon Companies, Inc.*, 253 F.3d 538 (10th Cir. 2001) (same); *Oberkramer v. IBEW-NECA Service Center, Inc.*, 151 F.3d 752 (8th Cir. 1998) (same); *Wilkes-Barre*, 647

Continued on following page

However, the narrow construction of § 301(a) adopted by the Ninth Circuit in this case means that employers and unions also will be precluded from bringing an action under § 301(a) to deter and redress such misconduct by a non-signatory. The court of appeals' ruling, thus, creates a dangerous gap or "no-man's land" in federal labor law that can be expected to lead to increased labor unrest and interference by non-signatories in collective bargaining agreements.

Although the Ninth Circuit suggested that it was Congress's job to fill in this "gap," Congress did that more than sixty years ago when it enacted § 301(a) and gave the federal courts the power and obligation to decide suits for violations of labor agreements and fashion meaningful common law remedies for such violations. *Lincoln Mills*, 353 U.S. at 103-04. At no point has Congress suggested otherwise, and its silence supports the Court's role as the author and arbiter of federal common law under § 301(a). Since the Ninth Circuit denied Petitioner's action against the IBT, this Court must now fulfill that Congressional mandate, as it has in numerous cases brought in the past under § 301(a).

We have not come this far in our jurisprudence under § 301 to create a judicial no-man's land whereby an international union may

---

Continued from previous page

F.2d at 377, 379-81 (recognizing the same as a basis for allowing an action under § 301(a)).

insert itself into the bargaining relationship of a local union, directly cause members of the local union to repudiate their agreement with an employer, and then walk away with impunity, unanswerable in the law for the damage it has caused. The need for responsibility in and enforceability of labor agreements was the cornerstone on which § 301 was based. Those values should not be rendered illusory just because the party causing the damage is not a signatory.

III. In Fashioning A Federal Remedy Under § 301(a), Federal Courts Should Consider The Nature Of The Problem That Arises When A Non-Signatory Like The International Union Causes A Violation Of A Contract, As Well As The National Labor Policies Embedded in § 301(a), And Other Well-Settled Principles Of Common Law.

In light of *Lincoln Mills* and the Court's role as the author and arbiter of federal common law under § 301(a), there is nothing "uncommon" or extraordinary about this Court recognizing an action under § 301(a) against a defendant who did not sign the agreement or assume any formal rights or obligations under it, but who nevertheless has caused a violation of the agreement intentionally and improperly. 353 U.S. at 103-04.

While the Court need not (and AGC respectfully submits should not) attempt to delineate the precise contours of such an action

in this case, the nature of the "problem" that arose in *Wilkes-Barre* and this case suggests that a signatory to a labor agreement should be able to state a claim under § 301(a) against a defendant who did not sign the agreement or assume any formal rights or obligations under it by alleging that (1) a contract existed between an employer and a labor organization in an industry affecting commerce; (2) the non-signatory defendant knew of the existence of the agreement; (3) the non-signatory defendant acted directly and intentionally to cause a violation of the agreement; (4) the non-signatory's conduct was improper and not excused by any legal right or privilege applicable under the circumstances; and (5) the signatory suffered damages.

Moreover, the Court's recognition of a limited cause of action under § 301(a) under the circumstances of this case would not mean that a defendant could not interpose an appropriate defense to such an action. For example, a defendant could contend that no agreement was formed, that no actual violation of an agreement occurred, that the defendant did not act directly or with specific intent to cause a violation of the agreement, or that the defendant's conduct was not improper under the circumstances.

And, consistent with *Lincoln Mills*, federal courts would apply federal substantive law to any such claims and defenses asserted under §301(a), drawing upon legal concepts, rights, defenses, and remedies commonly recognized in both state and federal law to the extent necessary to "effectuate" paramount federal

labor policies and delineate precisely what conduct would be deemed improper under the circumstance of a particular case. *Id.* at 457.[13]

Such an approach to adjudicating a claim against a non-signatory would effectuate Congress's paramount goals of ensuring that collective bargaining agreements are construed and enforced uniformly and deterring and redressing misconduct that violates the rights and expectations of parties under these same agreements. At the same time, such a standard would allow federal courts to place real and meaningful limits on the scope of an action under § 301(a) and ensure that § 301(a) actions are strictly limited to conduct that is inimical to the collective bargaining process and the industrial peace created by federally protected labor agreements.

---

13 For example, in determining whether a non-signatory's conduct is "improper," federal courts can consider: (a) the nature of the non-signatory's conduct; (b) the non-signatory's motive; (c) the interests of the parties to the agreement and the beneficiaries of the agreement; (d) the interests sought to be advanced by the non-signatory; (e) the social interests in protecting the freedom of action of the non-signatory and the contractual interests of the parties; (f) the proximity or remoteness of the non-signatory's conduct to the interference; and (g) the relations between the parties. *See* Restatement (Second) of Torts §§ 766, 767 (summarizing general legal elements of, and defenses to, intentional, improper interference with the performance of a contract).

CONCLUSION

Whatever the precise contours of § 301(a), a federal cause of action certainly should be available to a signatory under the circumstances of this case, where a non-signatory is alleged to have involved itself in every aspect of the collective bargaining process and then, when it was dissatisfied with the resulting agreement, directed union members to violate the agreement, not for their benefit, but to coerce the signatory into granting additional express rights that would benefit the non-signatory directly.

To "exclude" such a claim from the "ambit of §301(a)" would "stultify" national labor policy and leave rights and obligations under labor law vulnerable to intentional misconduct. *Smith*, 371 U.S. at 200-01.

Respectfully submitted,

Michael E. Kennedy
General Counsel
THE ASSOCIATED
GENERAL CONTRACTORS
OF AMERICA, INC.
2300 Wilson Boulevard,
Suite 400
Arlington, VA 22201
703-837-5335

William Bevan III
David J. Bird*
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
412-288-3131

Counsel for Amicus Curiae The Associated General Contractors of America, Inc.

*Counsel of Record

September 3, 2009

AMICUS CURIAE BRIEF

No. 08-1214

Supreme Court, U.S.
FILED
SEP 3 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GRANITE ROCK COMPANY,

Petitioner,

v.

THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS & TEAMSTERS LOCAL 287,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE CENTER ON NATIONAL LABOR POLICY, INC. AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICUS CURIAE* ON THE MERITS IN SUPPORT OF PETITIONER

Of Counsel
QUNETIN RIEGEL
NATIONAL ASSN. OF MANUFACTURERS
1331 Penn. Ave., N.W.
Washington, D.C. 20004
(202) 637-2000

MICHAEL E. AVAKIAN*
CENTER ON NATIONAL LABOR POLICY, INC.
5211 Port Royal Rd., Ste 610
No. Springfield, VA 22151
(703) 321-9180

Attorney for Amicus Curiae
**Counsel of Record*

EDTA 50TANG

QUESTIONS PRESENTED

1. Does a federal court have jurisdiction to determine whether a collective bargaining agreement was formed when it is disputed whether any binding contract exists, but no party makes an independent challenge to the arbitration clause apart from claiming it is inoperative before the contract is established?

2. Does Section 301(a) of the Labor-Management Relations Act, which generallypreempts otherwise available state law causes of action, provide a cause of action against an international union that is not a direct signatory to the collective bargaining agreement, but effectively displaces its signatory local union and causes a strike breaching a collective bargaining agreement for its own benefit?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF AMICI 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 2

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. ALL PARTIES ARE ENTITLED TO A JUDICIAL PROCEEDING TO DETERMINE THE THRESHOLD QUESTION WHETHER A CONTRACT EXISTS BEFORE ARBITRATION CAN PROCEED 5

A. The Existence of an Arbitration Provision Within a Contested CBA Is Not Within the Province of an Arbitrator to Decide 7

B. Federal Policy Requires Consistency Between the Federal Courts of Appeals and State Courts Considering Labor Arbitration Provisions 13

C. Labor Law Questions Should be Resolved Consistently with the National Policy For Resolving Commercial and Labor Disputes 19

D. The Breath of the Arbitration Clause Does Not Require An Arbitrator's Expertise to Decide Whether a Contract In Fact Exists 23

II. AN LMRA §301(a) ACTION IS AVAILABLE AGAINST THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS IN THIS CASE IN VIEW OF THE STRONG PUBLIC POLICY IN FAVOR OF HOLDING PARENT UNIONS LIABLE FOR THE ACTS OF THEIR LOCALS 27

CONCLUSION 35

TABLE OF AUTHORITIES

CASES

Page

14 Penn Plaza LLC v. Pyett,
129 S. Ct. 1456 (2009) 8

AT&T Technologies, Inc. v. Communication Workers,
475 U.S. 643 (1986) 4, 7, 8, 9, 23

Adams v. Suozzi,
433 F.3d 220 (2d Cir. 2005) 15, 24

Alexander v. Local 496, Laborers' International Union of North America,
177 F.3d 394 (6th Cir. 1999) 29, 32

Allen v. International Alliance of Theatrical, Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO,
338 F.2d 309 (5th Cir. 1964) 30

Allis-Chalmers Corp. v. Lueck,
471 U.S. 202 (1985) 28

Also Chastain v. Robinson-Humphrey Co. Inc.,
957 F.2d 851 (11th Cir. 1992) 17, 24

Avedon Engineering Inc. v. Seatex,
126 F.3d 1279 (10th Cir. 1997) 11

Boys Markets, Inc. v. Retail Clerk's Union, Local 770,
398 U.S. 235 (1970) 5, 13, 23, 25

Briggs & Stratton Corp. v. Local 232, Int'l Union, Allied Industrial Workers of America (AFL-CIO),
36 F.3d 712 (7th Cir. 1994) 20

Buckeye Check Cashing Inc. v. Cardegna,
546 U.S. 440 (2006) 15, 20

Cagle's Inc. v. NLRB,
588 F.2d 943 (5th Cir. 1979) 31

Carbon Fuel Co. v. UMWA,
444 U.S. 212 (1979) 29

Chauffeurs, Teamsters and Helpers Local 391 v. Terry,
494 U.S. 558 (1990) 10

Circuit City Stores Inc. v. Adams,
532 U.S. 105 (2001) 21

Clear Channel Outdoor Inc. v. International Unions of Painters and Allied Trades Local 770,
558 F.3d 670 (7th Cir. 2009) 11

Coca-Cola Bottling Co. of New York Inc. v. Soft Drink and Brewery Workers Union Local 812, Int'l Brotherhood of Teamsters, 242 F.3d 52 (2d Cir. 2001) 20

Connally v. Georgia, 429 U.S. 245 (1977) 12

Dowd v. Int'l Longshoremen's Assn., AFL-CIO, 975 F.2d 779 (11th Cir. 1992) 30, 31, 32, 33

Electrical Workers, AFL-CIO v. Myers, 434 U.S. 801 (1977) 32

First Options of Chicago, Inc., 514 U.S. 938 (1995) 4, 10, 26

Fox v. Tanner, 101 P.3d 939 (Wyo. 2004) 18

Gibson v. Berryhill, 411 U.S. 564 (1973) 12

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 21

Granite Rock Co. v. Int'l Brotherhood of Teamsters, Freight Construction, General Drivers, Warehousemen & Helpers Local 287 (AFL-CIO) et al., 546 F.3d 1169 (9th Cir. 2008) 2, 3, 9, 23, 29

H.K. Porter Co. v. NLRB,
397 U.S. 99 (1970) 6

Hudson v. Outlet Rental Car Sales Inc.,
876 So. 2d 455 (Ala. 2003) 18

I.S. Joseph Co. Inc. v. Michigan Sugar Co.,
803 F.2d 396 (8th Cir. 1986) 17

Int'l Bhd. of Electrical Workers, AFL-CIO v. NLRB,
487 F.2d 1113 (D.C. Cir. 1972) 33

Int'l Chemical Workers Union v. Columbian Chemicals Co.,
331 F.3d 491 (5th Cir. 2003) 20

Intern. Ass'n of Mach.& Aerospace Workers, AFL-CIO v. Wilson Trailer Co.,
289 N.W.2d 608 (Iowa 1980) 14

International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union 1199 v. Pepsi-Cola General Bottlers Inc.,
958 F.2d 1331 (6th Cir. 1992) 25

International Longshoremen's and Warehousemen's Union Local 8 v. Pacific Maritime Ass'n,
133 Or. App. 245, 889 P.2d 1358 (Or.App. 1995) 14

International Union, United Mine Workers of America v. Big Horn Coal Co., 916 F.2d 1499 (10th Cir. 1990) 25

Iowa Management & Consultants Inc. v. Sac & Fox Tribe of the Mississippi in Iowa, 656 N.W.2d 167 (Iowa 2003) 18

Kostecki v. Dominick's Finer Foods, Inc. of Illinois, 361 Ill. App. 3d 362, 836 N.E.2d 837 (Ill.App. 1 Dist. 2005) 14

Lane Crane Service Inc. v. International Brotherhood of Electrical Workers Local Union No. 177, 704 F.2d 550 (11th Cir. 1983) 30

Litton Financial Printing Division v. NLRB, 501 U.S. 190 (1991) 8

Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Lucas Flour Co., 369 U.S. 95 (1962) 23, 25

Local Union No. 898 of the Int'l Brotherhood of Electrical Workers, AFL-CIO v. XL Electric Inc., 380 F.3d 868 (5th Cir. 2004) 8

Major League Baseball Players Association v. Garvey,
532 U.S. 504 (2001) 11

McCarroll v. Los Angeles County District Council of Carpenters,
315 P.2d 322 (Cal. 1957) 15, 19, 25

Mendez v. Puerto Rican Int'l Companies Inc.,
553 F.2d 709 (3d Cir. 2009) 8

Meyer v. Nebraska,
262 U.S. 390 (1923) 10

Microchip Technology Inc. v. U.S. Philips Corporation,
367 F.3d 1350 (Fed. Cir. (Ariz.) 2004) 16, 24

Myers v. Gilman Paper Corp.,
544 F.2d 837 (5th Cir. 1977) 32

NLRB v. Denver Building & Construction Trades Council,
341 U.S. 675 (1951) 34

NLRB v. Int'l Longshoremen's and Warehousemen's Union,
210 F.2d 581 (9th Cir. 1954) 31

NLRB v. International Union, United Mine Workers of America,
727 F.2d 954 (10th Cir. 1984) 30

Nagrampa v. MailCoups Inc.,
469 F.3d 1257 (9th Cir. 2006) 20

Oil, Chemical and Atomic Workers Intern. Union, AFL-CIO v. Sandvik,
102 Wash. App. 764, 10 P.3d 470 (Wash App. Div. 3, 2000) 14

Peters v. Rivers Edge Min., Inc.,
2009 WL. 804116, 186 L.R.R.M. (BNA) 2156 (W.Va., 2009) 14

Prima Paint Corp. v. Flood & Conklin Mfg. Co.,
388 U.S. 395 (1967) 15, 20

Quelimane Co. v. Stewart Title Guaranty Co.,
960 P.2d 513 (Cal. 1998) 28

Reichold Chemicals, Inc.,
277 N.L.R.B. 639 (1985) 5

Riverton Coal Co. v. UMWA,
453 F.2d 1035 (6th Cir. 1972) 32

Rosenthal v. Great Western Financial Securities Corporation,
926 P.2d 1061 (Cal. 1996) 18

Sandvik AB v. Advent International Corporation,
220 F.3d 99 (3d Cir. 2000) 15, 24

Sanford v. Memberworks Inc.,
483 F.3d 956 (9th Cir. 2007) 15, 24

Service Employees Union, Local No. 87,
291 N.L.R.B. 82 (1988) 30, 32

Sheet Metal Workers' Int'l Assn., AFL-CIO v. NLRB,
293 F.2d 141 (D.C. Cir. 1961) 33

Sheet Metal Workers Union, Local No.2, 203,
N.L.R.B. 954 (1973) 33

Shell Oil Co.,
77 N.L.R.B. 1306 (1948) 5

Spahr v. Sacco,
330 F.3d 1266 (10th Cir. 2003) 16, 24

Sphere Drake Insurance Ltd. v. All American Insurance Co.,
256 F.3d 587 (7th Cir. 2001) 16

Star Kist Samoa Inc.,
237 N.L.R.B. 238 (1978) 31

Teledyne Inc. v. Kone Corp.,
892 F.2d 1404 (9th Cir. 1989) 20, 22

Textile Workers Union of America v. Lincoln Mills of Alabama,
353 U.S. 448 (1957) 19, 25

Thompson v. Lithia Chrysler Jeep Dodge of Great Falls Inc.,
185 P.3d 332 (Mont. 2008) 18

Three Valleys Municipal Water District v. E.F. Hutton & Co. Inc.,
925 F.2d 1136 (9th Cir. 1991) 17

Tumey v. Ohio,
273 U.S. 510 (1927) 12

United Paperworkers International Union, AFL-CIO v. Misco Inc.,
484 U.S. 29 (1987) 11

United Steelworkers of America v. American Manufacturing Co.,
363 U.S. 564 (1960) 19

Vulcan Materials Co. v. United Steelworkers of America AFL-CIO,
430 F.2d 446 (5th Cir. 1970) 30

Warehouse, Processing, Distribution Workers Union, Local 26 v. Hugo Neu Proler Co.,
65 Cal. App. 4th 732, 76 Cal. Rptr. 2d 814
(Cal.App. 2d Dist. 1998) 14

Wells v. Int'l Union of Op. Engrs, Local 181,
303 F.2d 73 (6th Cir. 1962) 34

Westmoreland Coal Co. Inc. v. Int'l Union, UMWA,
910 F.2d 130 (4th Cir. 1990) 29

White Oak Coal Co. v. United Mine Workers of America,
318 F.2d 591 (6th Cir. 1963) 30

Will-Drill Resources Inc. v. Samson Resources Co.,
352 F.3d 211 (5th Cir. 2003) 16, 24

LEGISLATIVE HISTORY

65 Cong. Rec. 1931 (1924) 22

S. Rep. No. 105, 80th Cong., 1st Sess., p.2 (1947) 27

MISCELLANEOUS

David Feller, A General Theory of the Collective Bargaining Agreement, 61 Cal. L. Rev. 663 (1973) 6

John Danforth, Tortious Interference With Contract: A Reassertion of Society's Interest in Commercial Stability and Contractual Integrity, 81 Colum. L. Rev. 1491, 1511 (1981) 28

Joshua R. Welsh, Has Expansion of the Federal Arbitration Act Gone Too Far?: Enforcing Arbitration Clauses in Void Ab Initio Contracts, 86 Marq. L. Rev. 581, 601-07, 610, 615 n.248 (2002) 17

Harry T. Edwards, *Where are we Heading With Mandatory Arbitration of Statutory Claims in Employment?*, 16 Ga. St. Univ. L. Rev. 293, 307 (1999) 12

Joseph L. Franco, *Casually Finding the Clear and Unmistakable: A Re-Evaluation of First Options in Light of Recent Lower Court Decisions*, 10 Lewis & Clark L. Rev. 443 (2006) 26

Mark Berger, Arbitration and Arbitrability: Toward an Expectation Model, 56 Baylor L. Rev. 753, 784-85 17

S. Cole, Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees, 64 UMKC L. Rev. 449, 466 (1996) 22

Study of Labor Arbitrators, 11 U. Pa. J. Bus. & Emp 6

Teledyne Inc. See Jonathan M. Strang, *The Chicken Comes First: Who Decides if an Arbitrator Has Jurisdiction to Arbitrate?*, 16 Fed. Circuit B.J. 191 (2006) 23

Veeder Root Co. v. Local 6521 United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, 293 Fed. Appx. 924, 925 (3d Cir. 2008) 12

William B. Gould IV, Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration, 55 Emory L.J. 609, 640-43 (2006) 21

INTRODUCTION

Pursuant to Supreme Court Rule 37.3(a), the Center on National Labor Policy Inc. ("Center") and the National Association of Manufacturers ("NAM") submit this brief *amicus curiae* in support of Petitioner Granite Rock Co. All parties have given written consent to the filing of this brief.[1]

INTEREST OF THE *AMICI*

The Center is a public interest legal foundation chartered to provide legal assistance to individuals whose statutory and constitutional rights in the labor arena have been violated by powerful, organized interests such as labor unions and governmental entities.

The Center, as a public-interest organization, believes that the individual rights of consumers, taxpayers, workers, and public citizens are paramount to the collective rights of private organizations such as labor unions.

NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media

---

[1]The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

and the general public about the vital role of manufacturing to America's economic future and living standards.

The *amici* are filing this amicus brief in support of the Petitioner because the two issues being considered are of great importance to their members and to the business community. The *amici* wish to bring to the Court's attention that the federal common law of labor contracts requires revision and there will be an adverse impact on public policy and on labor law generally if the Ninth Circuit's aberrant decision is allowed to stand.

STATEMENT OF THE CASE

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in *Granite Rock Co. v. Int'l Brotherhood of Teamsters, Freight Construction, General Drivers, Warehousemen & Helpers Local 287 (AFL-CIO) et al.*, 546 F.3d 1169 (9th Cir. 2008), was granted by the Court on June 29, 2009.

STATEMENT OF FACTS

Before the expiration of a collective bargaining agreement between Granite Rock Co. and Local 287 on April 30, 2004, the parties began negotiations, and Rome Aloise, the administrative assistant to the General President of the International Brotherhood of Teamsters ("IBT") (who represented the interests of IBT and other local unions affiliated with the IBT in the negotiations) advised Local 287 that certain provisions of the agreement were inadequate. *See* 546 F.3d at 1171.

In June 2004, after a collective bargaining agreement between Granite Rock Co. and Local 287 expired, Local 287 members went on strike. *See ibid.* There was a new collective bargaining agreement which contained a "no-strike" clause and required the parties to arbitrate "[a]ll disputes arising under this agreement." *See id.* at 1171-72. At the conclusion of the successful bargaining session Local 287's business representative George Netto told Granite Rock Co. that they would stop picketing but also raised the topic of a "back-to-work" agreement to provide for the terms under which the parties would return to work, including liability for actions taken during the strike. *Id.* at 1171. The new agreement was allegedly ratified on July 2, 2004, *see id.* at 1171-72, but this is disputed, *see id.* at 1172.

On July 5, 2004, Aloise and Local 287 members instructed workers not to return to work the next day. On July 6, 2004, Netto demanded a back-to-work agreement which would explicitly shield Local 287, its members and IBT from any liability arising from the strike. Granite Rock Co. refused to sign such an agreement, and Local 287 continued its strike. *Ibid.*

Granite Rock Co. sued Local 287 for breach of contract and IBT for tortious interference with contract, both in the Northern District of California and under §301(a) of the Labor Management Relations Act ("LMRA" or "Labor Act"), 29 U.S.C. §185(a). The district court granted IBT's motion to dismiss under Fed. R. Civ. Proc. 12(b)(6), on the ground that Granite Rock Co. had failed to state a claim against it under §301(a), and Granite Rock Co. timely appealed. However, the district court denied Local 287's motion to compel arbitration of the question of

contract ratification, and Local 287 timely appealed. *Ibid.*

The United States Court of Appeals for the Ninth Circuit affirmed the dismissal of the claims against IBT, *id.* at 1176, but reversed the denial of Local 287's motion to compel arbitration of contract ratification, *id.* at 1172.

SUMMARY OF ARGUMENT

The court of appeals ordered arbitration to decide the existence of a collective bargaining agreement between the parties, where Granite Rock Co. had not consented to arbitration of this question. The presumption is contrary to this Court's jurisprudence arising from *AT&T Technologies, Inc. v. Communication Workers*, 475 U.S. 643 (1986), and *First Options of Chicago, Inc.*, 514 U.S. 938, 944 (1995), which is not in favor of an arbitrator ruling on his/her own jurisdiction. The Ninth Circuit's decision conflicts with this Court's applicable decisions on the arbitrability of arbitrability; the applicability of state law under Section 301 of the Labor Act on the arbitrability of arbitrability, the doctrine of severability, and how broad may an arbitration clause be read, as set forth in *AT&T Technologies, Inc.*

The interpretation of a broad arbitration clause follows a dangerous tendency among other courts to produce an order to arbitrate arbitrability in a dispute *which itself may not be arbitrable.*

Of equally great concern to the *Amici*, the Ninth Circuit's holding bestows undeserved immunity upon international unions who intentionally interfere with collectively bargained agreements of their union locals, in

plain violation of Section 301 of the Labor Management Relations Act. The statutory purpose of repose in the legislative history of Section 301, now eliminates a remedy against an interloper, the international union here. While resolving the conflict among the federal circuit courts regarding the availability of a §301(a) action for tortious interference with a collective bargaining agreement, this Court should take into account the strong public policy remedy in favor of holding parent unions (and third parties) liable for the acts of their locals (agents) that interfere with stable collective bargaining relationships the Congress unquestionably chose to protect and preserve by the enactment of Section 301.

These questions require the Court's recognition.

ARGUMENT

I. ALL PARTIES ARE ENTITLED TO A JUDICIAL PROCEEDING TO DETERMINE THE THRESHOLD QUESTION WHETHER A CONTRACT EXISTS BEFORE ARBITRATION CAN PROCEED.

A union's agreement not to strike is commonly understood to be obtained in exchanged for a grievance-arbitration provision. *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 248-49 (1970); *Reichold Chemicals, Inc.*, 277 N.L.R.B. 639, 640 (1985), or even as a condition of reaching agreement. *Shell Oil Co.*, 77 N.L.R.B. 1306, 1308 (1948). In the absence of a collective bargaining agreement, parties may exercise self-help and

economic weapons, such as lock-outs or strikes. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 109 (1970). In that case, the Court observed that, "[i]t cannot be said that the Act forbids an employer or a union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining." 397 U.S. at 109.

In the present case, Local 287 went on strike against Granite Rock Co. asserting no agreement and engaged in strike behavior against the Company which clearly demonstrated that the Union believed no collective bargaining agreement with a no-strike clause had been reached with the Company. Since the existence of an agreement was in question, reinforced by the unions' economic activity inconsistent with an agreement, Granite Rock Co. sued to enforce compliance with the agreement it alleged existed.

Because the no-strike clause and the grievance and arbitration procedure are "the true essence of the typical CBA," the Ninth Circuit's holding would allow a labor union to receive all the benefit of any tentative bargaining agreement without giving up any rights in exchange. Malin and Biernat, *Do Cognitive Biases Infect Adjudication? A Study of Labor Arbitrators*, 11 U. Pa. J. Bus. & Emp. L. 175, 179 (Fall 2008) (quoting David Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Cal L. Rev. 663 (1973)). The importance of this *quid pro quo* has been restated by Frank Cummings & Judge Jacob P. Hart, *Labor Contract Clauses from A to Z*, Emp. and Lab. Rel. L. for the Corp. Couns. and the Gen. Prac., SN020 ALI-ABA 503 (May 1-3, 2008), that a no-strike clause "is the only thing management gets out of a collective bargaining agreement; everything else is for the benefit of

the union."

Given the importance of tentative agreements in the bargaining process, which enables the parties to feel that progress is being made on a new contract without a disruption to the workflow, any ruling that unwinds these agreements will lead to more labor unrest and work stoppages as this case vividly demonstrates.

A. The Existence of an Arbitration Provision Within a Contested CBA Is Not Within the Province of an Arbitrator to Decide.

The federal policy supporting arbitration has been settled. It is an issue for judicial determination and not an arbiter, unless the parties clearly and unmistakably provide otherwise. In this case, however, the court of appeals misapplied the law and decided this important federal question in a way which conflicts with this Court's applicable decisions and decisions in other federal and state courts.

In *AT&T Technologies Inc.* v. Communication Workers, 475 U.S. 643, 648-49 (1986), vacating a decision which had affirmed an order for arbitration of arbitrability, this Court reaffirmed that,

> arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit

> such grievances to arbitration [citations omitted].

Accord, Litton Financial Printing Division v. NLRB, 501 U.S. 190, 208 (1991) ("a party cannot be forced to arbitrate the arbitrability question" (citation omitted)) (reversing portion of decision which had refused to enforce Board's order that certain grievances were not arbitrable); *see also Mendez v. Puerto Rican Int'l Companies Inc.*, 553 F.2d 709, 711 (3d Cir. 2009).

Therefore, "the question of arbitrability – whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance – is undeniably an issue for judicial determination." *See AT&T Technologies Inc.*, 475 U.S. at 649; *accord, Litton Financial Printing Division*, 501 U.S. at 208 ("[w]hether or not a company is bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the court"); *see also 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1473 (2009) (rejecting respondents' argument that "the particular CBA at issue here does not clearly and unmistakably require them to arbitrate their ADEA claims" where "respondents did not raise these contract-based arguments *in the District Court or the Court of Appeals*" (emphasis added)); *Local Union No. 898 of the Int'l Brotherhood of Electrical Workers, AFL-CIO v. XL Electric Inc.*, 380 F.3d 868, 870 (5th Cir. 2004) ("the question of arbitrability is a question for the court") (affirming refusal to enforce arbitration award where contract was not in effect). Similarly, a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy is also for the court to decide. *See AT&T Technologies*

Inc., 475 U.S. at 652.

Local 287's dispute of the ratification date of the new collective bargaining agreement raises a question of arbitrability because its dispute affects whether or not there was a contract in effect during the continuation of the strike on and after July 5, 2004. Since Granite Rock Co. (and also the International Brotherhood of Teamsters, which was not a party to the agreement) never agreed to arbitrate this particular issue, the court of appeals decision in this case conflicts with *AT&T Technologies Inc.* and *Litton Financial Printing Division.*

AT&T Technologies Inc., 475 U.S. at 649, holds that "*[u]nless the parties clearly and unmistakably provide otherwise*, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator" (emphasis added). The court of appeals at 546 F.3d at 1177 n.4, reaches its result here by disregarding this holding, relying instead on the subsequent, more general and contrary language in *AT&T Technologies Inc.* that,

> [a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

By relying on the wrong language from *AT&T Technologies Inc.*, the court of appeals has decided this important federal question in this case in a way which undermines this Court's clearly applicable decision in that

case and the understanding of parties in collective bargaining.

This Court reaffirmed *AT&T Technologies Inc.*'s more specific holding that the court should decide arbitrability in *First Options of Chicago, Inc.*, 514 U.S. at 944: "*Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so*" (emphasis added, citations omitted) (affirming finding that arbitrability was subject to independent review by the courts).

In *First Options of Chicago, Inc.*, 514 U.S. at 943, this Court also confirms the principles that "[i]f ... the parties did not agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently" (emphasis omitted) and that "arbitration is simply a matter of contract between the parties; it s a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration."

There is no indication that the courts cannot make an exact pronouncement in this case, which involves the protection of important federal rights both statutory (§301(a)) and constitutional (*see Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (liberty guaranteed by 14th Amendment includes "the right of the individual to contract")). In addition, only a judicial proceeding may provide the jury trial guaranteed by the Seventh Amendment. *See Chauffeurs, Teamsters and Helpers Local 391 v. Terry*, 494 U.S. 558, 573-74 (1990)(affirming

right to jury trial in contract action under §301).[2]

The rule of law is an important consideration here. Arbitration, however, is a form of personal decisionmaking with only minimal judicial review. *See Major League Baseball Players Association v. Garvey*, 532 U.S. 504, 509 (2001) ("Judicial review of a labor-arbitration decision pursuant to such an agreement is very limited. Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement") (reversing decision which had reversed arbitration proceedings and instructed entry of award); *United Paperworkers International Union, AFL-CIO v. Misco Inc.*, 484 U.S. 29, 39 (1987) ("improvident, even silly, factfinding .... is hardly a sufficient basis for disregarding what the agent appointed by the parties determined to be the historical facts") (reversing decision which had affirmed vacation of arbitration award); *Clear Channel Outdoor Inc. v. International Unions of Painters and Allied Trades Local 770*, 558 F.3d 670 (7th Cir. 2009)("[w]hat Clear Channel's argument boils down to is that the arbitrator's decision is contrary to the plain meaning of the contract; but this is simply another way of arguing that the decision is wrong on the merits, and that is precisely the type of argument that is beyond our purview") (affirming order which confirmed arbitrator's

---

[2]The FAA also specifically creates the right to a jury trial on the issue of the existence of an agreement to arbitrate. *See Avedon Engineering Inc. v. Seatex*, 126 F.3d 1279, 1283 (10th Cir. 1997)("[w]hen parties dispute the making of an agreement to arbitrate, a jury trial on the existence of the agreement is warranted unless there are no genuine issues of material fact regarding the parties' agreements")(reversing stay pending arbitration).

award); *Veeder Root Co. v. Local 6521 United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union*, 293 Fed. Appx. 924, 925 (3d Cir. 2008) ("[w]e do not review an arbitrator's decision for legal error") (reversing vacation of arbitration award).

Further, due process protects parties from financially interested judges. *See Connally v. Georgia*, 429 U.S. 245, 250 (1977) (justice of the peace "is paid, so far as search warrants are concerned, by receipt of the fee prescribed by statute for his issuance of the warrant, and he receives nothing for his denial of the warrant") (vacating criminal conviction where financially interested justice of the peace had issued search warrant); *Gibson v. Berryhill*, 411 U.S. 564, 578 (1973) ("[b]ecause the Board of Optometry was composed solely of optometrists in private practice for their own account, the District Court concluded that success in the Board's efforts would possibly redound to the personal benefit of members of the Board") (affirming injunction against Board); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)("[i]t is certainly not fair to each defendant brought before the mayor for the careful and judicial consideration of his guilt or innocence that the prospect of such a prospective loss by the mayor should weigh against his acquittal") (reversing criminal conviction where mayor was paid from criminal fines).

An arbitrator, on the other hand, may have a financial incentive to find arbitrability. Arbitrator fees of $600 per hour are not uncommon, and mediation can be as high as $25,000 per day. *See* Harry T. Edwards, *Where are we Heading With Mandatory Arbitration of Statutory Claims in Employment?*, 16 Ga. St. Univ. L. Rev. 293, 307

(1999).

The ruling of the Ninth Circuit overlooks these important markers by directing an impractical outcome. The Ninth Circuit improperly drew up the requirement that an independent challenge to an arbitration clause must be asserted to obtain a judicial ruling. This very condition is contrary to the long line of decisions from this Court and the federal circuit courts and must be reversed.

B. Federal Policy Requires Consistency Between the Federal Courts of Appeals and State Courts Considering Labor Arbitration Provisions.

Concurrent state court jurisdiction under Section 301 of the Labor Act and the FAA necessitates reversal.

Congress did not foreclose state court jurisdiction to enforce collective bargaining agreements under Section 301(a), but intended the enactment to "*supplement* and not to encroach upon, the pre-existing jurisdiction of the state courts." *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 245 (1970). Recognizing that "a certain diversity exists among the state and federal systems in matters of procedural and remedial detail, *id.* at 246, the "relative uniformity" in the federal and state court systems was to prevail, *id.*, and therefore "Congress deliberately chose to leave the enforcement of collective agreements 'to the usual process of the law,'" *Arnold v. Carpenters District Council of Jacksonville*. 417 U.S. 12, 16 (1974), quoting *Dowd Box Co. v. Courtney*, 368 U.S. 502, 513 (1962), which meant that Section 301 claims "may be

brought in either state or federal courts." *Id.*[3]

First Options of Chicago, Inc., *id.* at 944, instructs that "when deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally ... should apply ordinary state-law principles that govern the formation of contracts," but there is no indication in this case that the court of appeals considered California state law.

In California, "[t]he arbitrability of a dispute may itself be subject to arbitration *if the parties have so provided in their contract*," but this is "unusual" and still requires the court to decide this question:

> [E]ven when the parties have conferred upon the arbiter the *unusual* power of determining his own jurisdiction, the court cannot avoid the necessity of making a certain threshold determination of arbitrability, namely, whether the parties have in fact conferred this power on the arbiter.

---

[3]The state courts have indeed handled labor contract cases under Section 301 and applied the prevailing arbitration standards to them. *See e.g., Peters v. Rivers Edge Min., Inc.*, 2009 WL 804116, 186 L.R.R.M. (BNA) 2156 (W.Va., 2009); *Kostecki v. Dominick's Finer Foods, Inc. of Illinois*, 361 Ill.App.3d 362, 836 N.E.2d 837, 843 (Ill.App. 1 Dist. 2005); *Oil, Chemical and Atomic Workers Intern. Union, AFL-CIO v. Sandvik*, 102 Wash. App. 764, 10 P.3d 470, 474 (Wash App. Div. 3, 2000); *Warehouse, Processing, Distribution Workers Union, Local 26 v. Hugo Neu Proler Co.*, 65 Cal.App.4th 732, 76 Cal.Rptr.2d 814 (Cal.App. 2d Dist. 1998); *International Longshoremen's and Warehousemen's Union Local 8 v. Pacific Maritime Ass'n*, 133 Or.App. 245, 889 P.2d 1358 (Or.App. 1995); Local Lodge No. 1426, *Intern. Ass'n of Mach.& Aerospace Workers, AFL-CIO v. Wilson Trailer Co.*, 289 N.W.2d 608 (Iowa 1980).

McCarroll v. Los Angeles County District Council of Carpenters, 315 P.2d 322, 333 (Cal. 1957), *cert. denied*, 355 U.S. 932 (1958) (emphasis added) (affirming state court injunction against challenge that issue should have been referred to arbitration).

The decisions in *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440 (2006) and *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), which involve allegedly invalid agreements, are distinguishable from both *Teledyne Inc.* and this case on their facts: "The issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded." *Buckeye Check Cashing Inc.*, 546 U.S. at 444 n.1; *accord*, *Sandvik AB v. Advent International Corporation*, 220 F.3d 99, 106-07 (3d Cir. 2000)("[T]he doctrine of severability presumes an underlying, existent, agreement .... Mindful of the doctrine announced in *Prima Paint*, which did not consider a situation in which the *existence* of the underlying contract was at issue, we draw a distinction between contracts that are asserted to be 'void' or non-existent, as is contended here, and those that are merely 'voidable,' as was the contract at issue in *Prima Paint*, for purposes of evaluating whether the making of an arbitration agreement is in dispute").

Numerous federal circuit court decisions support this distinction between invalid and non-existent contracts. *See Sanford v. Memberworks Inc.*, 483 F.3d 956, 962 (9th Cir. 2007) ("challenges to the *existence* of a contract as a whole must be determined by the court prior to ordering arbitration"); *Adams v. Suozzi*, 433 F.3d 220, 226 (2d Cir.

2005) ("[t]he District Court possessed not only authority, but a duty, to determine whether there ever existed an agreement to arbitrate between the parties"); *Microchip Technology Inc. v. U.S. Philips Corporation*, 367 F.3d 1350, 1358 (Fed. Cir. (Ariz.) 2004)("[c]ontrary to the Ninth Circuit's decision in *Teledyne*, the responsibility of the judiciary to resolve the gateway dispute of whether an agreement to arbitrate exists is not limited to situations in which there is an independent challenge to the arbitration clause"); *Will-Drill Resources Inc. v. Samson Resources Co.*, 352 F.3d 211, 219 (5th Cir. 2003) ("[W]here the very existence of an agreement is challenged, ordering arbitration could result in an arbitrator deciding that no agreement was ever formed. Such an outcome would be a statement that the arbitrator never had any authority to decide the issue. A presumption that a signed document represents an agreement could lead to this untenable result. We therefore conclude that where a party attacks the very existence of an agreement, as opposed to its continued validity or enforcement, the courts must first resolve that dispute" (citation omitted)); *Spahr v. Sacco*, 330 F.3d 1266, 1273 (10th Cir. 2003) ("[T]he analytical formula developed in *Prima Paint* cannot be applied with precision when a party contends that an entire contract containing an arbitration provision is unenforceable because he or she lacked the mental capacity to enter into the contract. Unlike a claim of fraud in the inducement, which can be directed at individual provisions in a contract, a mental capacity challenge can logically be directed only at the entire contract"); *Sphere Drake Insurance Ltd. v. All American Insurance Co.*, 256 F.3d 587, 591 (7th Cir. 2001)("Many appellate courts have held that the judiciary rather than an arbitrator decides whether a contract came into being .... The approach of *Sandvik* and its

predecessors is sound, for a person who has not consented (or authorized an agent to do so on his behalf) can't be packed off to a private forum. Courts have jurisdiction to determine their jurisdiction not only out of necessity (how else would jurisdictional disputes be resolved?) but also because their authority depends on statutes rather than the parties' permission. Arbitrators lack a comparable authority to determine their own authority because there is a non-circular alternative (the judiciary) and because the parties *do* control the existence and limits of an arbitrator's power. No contract, no power"). *Also Chastain v. Robinson-Humphrey Co. Inc.*, 957 F.2d 851, 854-55 (11th Cir. 1992); *Three Valleys Municipal Water District v. E.F. Hutton & Co. Inc.*, 925 F.2d 1136, 1140 (9th Cir. 1991); *I.S. Joseph Co. Inc. v. Michigan Sugar Co.*, 803 F.2d 396, 400 (8th Cir. 1986).

The court of appeals' decision in this case therefore conflicts with that of virtually every other federal circuit court on this important federal question.[4]

---

[4]On the other hand, some other federal circuit courts also have applied *Prima Paint Corporation* to void contracts, and such application can directly undermine consumer protection laws. *See* Joshua R. Welsh, *Has Expansion of the Federal Arbitration Act Gone Too Far?: Enforcing Arbitration Clauses in Void Ab Initio Contracts*, 86 Marq. L. Rev. 581, 601-07, 610, 615 n.248 (2002) (noting that "the fact that consumers are seeking clarification on this issue [in *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002), *cert. denied*, 537 U.S. 1087 (2002)] once again [after *Burden v. Check Into Cash of Kentucky LLC*, 535 U.S. 970 (2002)(denying certiorari)] is evidence of the desperate need for the Supreme Court's voice on this issue"); *see also* Mark Berger, *Arbitration and Arbitrability: Toward an Expectation Model*, 56 Baylor L. Rev. 753, 784-85 and n.153 (2004)(*Prima Paint Corporation* applied to void contracts).

The court of last resort in California also supports the distinction between invalid and non-existent agreements. *See Rosenthal v. Great Western Financial Securities Corporation*, 926 P.2d 1061, 1074 (Cal. 1996)("[i]f the entire contract is void *ab initio* because of fraud, the parties have not agreed to arbitrate any controversy; under that circumstance, *Prima Paint* does not require a court to order arbitration").

Decisions by numerous state courts of last resort support the distinction. *See Thompson v. Lithia Chrysler Jeep Dodge of Great Falls Inc.*, 185 P.3d 332, 338 (Mont. 2008) ("[i]f formation of a contract never occurred, then the parties never agreed to arbitrate and it would be inappropriate to submit the matter to arbitration"); *Fox v. Tanner*, 101 P.3d 939, 949-50 (Wyo. 2004)("[w]e do not find this argument [that only a claim of fraud in the inducement addressed to the arbitration provision itself should be adjudicated by the court] compelling"); *Hudson v. Outlet Rental Car Sales Inc.*, 876 So.2d 455, 457 (Ala. 2003)("a challenge to the very existence of the contract ... is an issue for a court, not an arbitrator, to decide" (citations omitted)); *Iowa Management & Consultants Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 656 N.W.2d 167, 171 (Iowa 2003) ("if the entire agreement is invalid under federal law, this would also invalidate the provision in the agreement for arbitration of disputes").

California law, contrary to the court of appeals in this case, presumes that the court will decide arbitrability:

> Whatever the merits of the procedure, we think it sufficiently outside the usual understanding of the relations of court and

> arbiter and their respective functions to assume that the parties expected a court determination of arbitrability unless they have clearly stated otherwise.

McCarroll, 315 P.2d at 334.

A California court could not have found that the parties had authorized the arbitrator to determine arbitrability in this case without first finding that they had formed a contract, but the court of appeals in this case refers this issue to the arbitrator instead. The Ninth Circuit's opinion decides this important federal question in a way which must be corrected.

C. Labor Law Questions Should be Resolved Consistently with the National Policy For Resolving Commercial and Labor Disputes.

This Court settlement of the important question whether to consider state law in its Section 301 consideration, should also consider the impact of not considering the impact of the FAA and its requirements. The Ninth Circuit applied FAA caselaw principles to reach its result in the instant case.

It is well established that "the substantive law to apply in suits under §301(a) is *federal* law, which the courts must fashion from the policy of our national labor laws." *See Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 456 (1957) (emphasis added). "Federal interpretation of the federal law will govern, not state law." *Id.* at 457; *see also United Steelworkers of*

America v. American Manufacturing Co., 363 U.S. 564, 567 (1960) (decrying "preoccupation with ordinary contract law" in Labor Management Relations Act case). But, *First Options of Chicago, Inc.* (and also *Mendez*) arise under the FAA, as do at least four of the decisions which are critical to the court of appeals' opinion in this case, *see Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 397 (1967); *Nagrampa v. MailCoups Inc.*, 469 F.3d 1257, 1263 (9th Cir. 2006); and *Teledyne Inc. v. Kone Corp.*, 892 F.2d 1404, 1410 (9th Cir. 1989).

Since *these are not §301 or even labor law cases*, it is impossible to determine whether they should control this case without resolving the conflict among the federal circuit courts on the same important matter regarding whether the FAA applies to §301 cases, *cf. Int'l Chemical Workers Union v. Columbian Chemicals Co.*, 331 F.3d 491, 494 (5th Cir. 2003) ("when reviewing a case involving a CBA and arising under Section 301, courts are not obligated to rely on the FAA"); *Coca-Cola Bottling Co. of New York Inc. v. Soft Drink and Brewery Workers Union Local 812, Int'l Brotherhood of Teamsters*, 242 F.3d 52, 53 (2d Cir. 2001) ("[w]e hold that in cases brought under Section 301 ..., the FAA does not apply") (rejecting jurisdictional challenge based on FAA); *with Briggs & Stratton Corp. v. Local 232, Int'l Union, Allied Industrial Workers of America (AFL-CIO)*, 36 F.3d 712, 715 (7th Cir. 1994), *reh'g denied*, 1994 WL 716867 (7th Cir. 1994), *cert. denied, United Paperworkers Int'l Union, AFL-CIO v. Briggs & Stratton Corp.*, 514 U.S. 1126 (1995) ("our circuit is among the minority that ... applies the Arbitration Act to most collective bargaining agreements").

This Court should, but it does not appear that it has yet settled this important question of federal law. In *Textile Workers Union of Am.*, "[a]lthough the Court decided the enforceability of the arbitration provisions in the collective-bargaining agreements by reference to §301 of the Labor Management Relations Act, 1947, 29 U.S.C. §185," "it did not reject the Court of Appeals' holdings that the arbitration provisions would not otherwise be enforceable pursuant to the FAA." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 41 (1991) (Stevens, J., dissenting). *See William B. Gould IV, Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 Emory L.J. 609, 640-43 (2006) ("there is now both division and doubt on the issue").

Of course, the 5-4 decision in *Circuit City Stores Inc. v. Adams*, 532 U.S. 105, 119 (2001), also does not settle either the applicability of the FAA to §301 cases or whether a collective bargaining agreement constitutes an employment contract. Section 2 of the FAA makes written agreements to arbitrate valid "in any maritime transaction or a contract evidencing a transaction involving commerce; Section 1 exempts certain employment contracts from the FAA.

Justice Stevens' dissenting opinion in *Circuit City Stores Inc.*, *id.* at 124-26, 128 and n.2, suggests that the FAA applies only to commercial and admiralty contracts and not to employment contracts or labor law at all; *see also id.* at 139 (Souter, J., dissenting) ("excluding all employment contracts from the Act's enforcement of mandatory arbitration clauses is consistent with Secretary Hoover's suggestion that the exemption language would respond to any 'objection ... to the inclusion of workers'

contracts'").[5]

In fact, organized labor abandoned its opposition to the FAA on the assumption that it did not apply to labor law, see *id.* at 126-27 (Stevens, J., dissenting) ("The legislation was reintroduced in the next session of Congress with Secretary Hoover's exclusionary language added to [9 U.S.C.] §1, and the amendment eliminated organized labor's opposition to the proposed law").

Professor Gould discusses the importance of whether a collective bargaining agreement constitutes an employment contract and is therefore within the scope of the FAA, with respect to matters such as the expeditiousness of arbitration and the availability of discovery and judicial review which may affect many cases other than this one. *See* Gould, *supra*, at 644-50.

The court of appeals' disregard of *First Options of Chicago, Inc.*'s instruction to consider state law amounts necessitates correction. Since the issue in *Teledyne Inc.* was whether the contract was ever finalized, the Ninth Circuit was incorrect in that case, *see* 892 F.2d at 1410, to rely on *Prima Paint Corp.* By relying on *Buckeye Check*

---

[5]*See also* Hearings on S.4213 and S.4214 Before the Subcommittee on the Judiciary of the Senate Judiciary Committee, 67th Cong., 4th Sess. 9 (1923)("not intended to be an act referring to labor disputes, at all"); and 65 Cong. Rec. 1931 (1924) ("[t]his bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts"); *both quoted in* S. Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. Rev. 449, 466 (1996).

Cashing Inc. and *Prima Paint Corp.*, the Ninth Circuit repeats the error it already made in *Teledyne Inc.* *See* Jonathan M. Strang, *The Chicken Comes First: Who Decides if an Arbitrator Has Jurisdiction to Arbitrate?*, 16 Fed. Circuit B.J. 191 (2006).

D. The Breath of the Arbitration Clause Does Not Require An Arbitrator's Expertise to Decide Whether a Contract In Fact Exists.

The Ninth Circuit's interpretation that arbitration of arbitrability was proper conflicts with this Court's applicable decisions set forth above, in *AT&T Technologies Inc.*; *Boys Markets Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235, 248 (1970); *Textile Workers Union of America*; and *Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962), and with the decisions of many other federal circuit courts and state courts of last resort, including California. This is particularly true in a case involving a strike, where, incredibly, the court of appeals *has produced an order to arbitrate arbitrability in a dispute which itself is not arbitrable.*

The court of appeals in this case, 546 F.3d at 1177, believes that the arbitration clause in this case covering "[a]ll disputes arising under this agreement" "is broad enough to cover the dispute over contract formation." But the arbitration clause in *AT&T Technologies Inc.*, 475 U.S. at 645 n.1, where this court disallowed arbitration, is similar, covering "any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder." The court of appeals' opinion

does not merely misapply *AT&T Technologies Inc.*'s rule of law here: rather, since it relies on the wrong holding from *AT&T Technologies Inc.* as discussed above, it decides this additional important federal question in a way which actually conflicts with this Court's clearly applicable decision in *AT&T Technologies Inc.*

Further, broad arbitration clauses like the one in this case are quite common even in the federal and state cases cited above, where courts have rejected arbitration of contract formation. *See Sanford*, 483 F.3d at 958 n.2 (agreement provided for arbitration of "[a]ny dispute arising between You and Us"); *Adams*, 433 F.3d at 223 ("breach of the terms of this Memorandum"); *Microchip Technology Inc.*, 367 F.3d at 1353 ("[a]ll disputes arising out of or in connection with the interpretation or execution of this Agreement"); *Will-Drill Resources Inc.*, 352 F.3d at 213 (any "action dispute [sic], claim or controversy of any kind now existing or hereafter arising between the parties in any way arising out of, pertaining to or in connection with" the agreement); *Spahr*, 330 F.3d at 1268 ("any controversy arising out of or relating to my account, to transactions with or for me or to this agreement or the breach thereof"); *Sandvik AB*, 220 F.3d at 101 (agreement provided for arbitration of "[a]ny dispute arising out of or in connection with this Agreement and/or any agreement arising out of this Agreement"); *Chastain*, 957 F.2d at 853 ("[b]oth agreements contain arbitration clauses, broadly binding the contractual parties to arbitrate any disputes arising in connection with the account"). The court of appeals' decision in this case therefore conflicts with each of these decisions by other courts on this important question of federal law.

In addition, "a strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of the agreement." *Lucas Flour Co.*, 369 U.S. at 105 (affirming damages judgment against union for strike). This arises from the fact that an agreement to arbitrate is the *quid pro quo* for an agreement not to strike, *see Boys Markets Inc.*, 398 U.S. at 248 (reversing judgment which had reversed injunction against union); *Textile Workers Union of America*, 353 U.S. at 455. Therefore, the strike itself provides indication that there was no agreement to arbitrate. *See International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union 1199 v. Pepsi-Cola General Bottlers Inc.*, 958 F.2d 1331, 1335 (6th Cir. 1992)("[t]he fact that Local 1199 called a strike demonstrates that Local 1199 did not believe that an implied agreement incorporating all of the undisputed terms of the old collective bargaining agreement existed") (affirming summary judgment against union which had sought arbitration); *International Union, United Mine Workers of America v. Big Horn Coal Co.*, 916 F.2d 1499, 1502 (10th Cir. 1990), *cert. denied*, 502 U.S. 1095 (1992) ("the commencement of a seven-month strike on October 5, 1987, during which time the alleged misconduct occurred, shows continued dissatisfaction with and rejection of the employer's offer") (reversing order for arbitration).

Indeed, under California law, the arbitration clause in this case would not allow arbitration even of the merits of Granite Rock Co.'s underlying breach of contract claim, let alone arbitration of arbitrability. *See McCarroll*, 315 P.2d at 334-35 (where arbitration procedure is alternative

to strike and for the purpose of avoiding a strike, not to adjudicate strike once it has occurred, agreement to arbitrate "all grievances or disputes arising between [the parties] over the interpretation or application of the terms of this Agreement" did not provide for arbitration of breach of no-strike clause, rather the contract must be read as a whole and the arbitration clause viewed in light of its purpose).

The court of appeals' suggestion in this case that the parties had agreed to arbitrate arbitrability where they had not agreed to arbitrate even the ultimate dispute, therefore not only lacks credibility, but also conflicts with the applicable decisions of this court, other federal circuit courts and California's court of last resort.

The court of appeals' holding appears to be a misapplication of dictum in *First Options of Chicago Inc.* 514 U.S. at 943. Although the court of appeals fails to cite any precedent for this misapplication (just as it fails even to mention *First Options of Chicago Inc.* in its opinion at all), in fact the decision in this case follows a dangerous tendency in which other federal circuit courts have been similarly too casual in finding the "clear and unmistakable" requirement satisfied. *See* Joseph L. Franco, *Casually Finding the Clear and Unmistakable: A Re-Evaluation of First Options in Light of Recent Lower Court Decisions*, 10 Lewis & Clark L. Rev. 443 (2006); Berger, *supra*, at 790 and n.178-79. This tendency must be arrested.

II. AN LMRA SECTION 301(a) ACTION IS AVAILABLE AGAINST THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS IN THIS CASE IN VIEW OF THE STRONG PUBLIC POLICY IN FAVOR OF HOLDING PARENT UNIONS LIABLE FOR THE ACTS OF THEIR LOCALS.

Notwithstanding the conflict among the federal circuit courts regarding the availability of a Section 301(a) action for tortious interference with a collective bargaining agreement, the goal of Section 301(a) is labor stability and there is a strong public policy in favor of holding parent unions liable for the acts of their locals. The Ninth Circuit's denial of a contractual or tort remedy in this case is contrary to this statutory purpose and public policy by eliminating any remedy which Granite Rock Co. could apply for from the district court against the international union.

Congress enacted §301(a) in 1947 following a period of increased strikes. S. Rep. No. 105, 80th Cong., 1st Sess., p.2 (1947); *accord*, H. Rep. No. 245, 80th Cong., 1st Sess., p.4. "During the last few years, the effects of industrial strife have at times brought our country to the brink of general economic paralysis." H. Rep. No. 245 at 3.

Labor stability has been the goal of §301(a) from the beginning, S. Rep. No. 105 at 15-16:

> In the judgment of the committee.... We feel that the aggrieved party should also have a right of action in the federal courts .... If

> unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations .... Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.

The existence of a tort as well as a contract remedy in these cases may advance the Congressional goal substantially by protecting the contract and signifying "society's interest in contractual integrity and thus augments the extent to which existing contracts will appear reliable and will tend to structure a market economy." John Danforth, *Tortious Interference With Contract: A Reassertion of Society's Interest in Commercial Stability and Contractual Integrity*, 81 Colum.L.Rev. 1491, 1511 (1981) (citation omitted).

But for Section 301(a), Granite Rock would have had a remedy against the International Brotherhood of Teamsters under California state law for its interference with the collective bargaining agreement according to the Ninth Circuit. *See Quelimane Co. v. Stewart Title Guaranty Co.*, 960 P.2d 513, 530-31 (Cal. 1998). But, §301(a) preempts state tort as well as contract claims which involve interpretation of a collective bargaining agreement. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985). Contrary to Congress' clear intent, the court of appeals in this case therefore has left Granite Rock Co. without a remedy against the international union.

The court of appeals expressly acknowledges the

conflict among the circuit courts regarding the availability of a Section 301(a) action for tortious interference with a collective bargaining agreement. *See* 546 F.3d at 1174-75. While resolving that conflict, this Court should take into account the strong public policy in favor of holding parent unions liable for the acts of their locals. Decisions from numerous circuit courts reflect this policy.

In *Westmoreland Coal Co. Inc. v. Int'l Union, UMWA*, 910 F.2d 130, 136 (4th Cir. 1990), the court affirmed relief against an international union in a §301(a) case based in part on statements by individual union officials, and specifically distinguished this Court's decision in *Carbon Fuel Co. v. UMWA*, 444 U.S. 212, 216-18 (1979):

> *Carbon Fuel Co.* is distinguishable. There, the Supreme Court held that an international union which neither instigates, supports, ratifies, nor encourages "wildcat" strikes by local unions cannot be held liable for the actions of the locals. The court was careful to distinguish the situation in *Carbon Fuel Co.* from one in which a local union takes actions, authorized by the parent union, which violate a contract.

Numerous other decisions also illustrate the liberal application of agency concepts in labor cases. *See Alexander v. Local 496, Laborers' International Union of North America*, 177 F.3d 394, 409 (6th Cir. 1999), *cert. denied*, 528 U.S. 1154 (2000) ("where an agency relationship exists, international unions are not only vicariously liable, they have an affirmative duty to oppose the local's discriminatory conduct") (affirming finding that

international union was liable for acts of local union); *Dowd*, 975 F.2d at 785 n.4, citing *Service Employees Union, Local No. 87*, 291 NLRB 82 (1988) (picketers acted as agents of union even absent evidence that union actually initiated or endorsed picketing); *NLRB v. International Union, United Mine Workers of America*, 727 F.2d 954, 956 (10th Cir. 1984)("the District and the Local were acting as agents for the International") (upholding Board conclusion that international union was responsible for violations by district and local unions); *Lane Crane Service Inc. v. International Brotherhood of Electrical Workers Local Union No. 177*, 704 F.2d 550, 554 (11th Cir. 1983)("express authorization or ratification are not necessary for liability") (affirming judgment against international union under ordinary agency standards); *Vulcan Materials Co. v. United Steelworkers of America AFL-CIO*, 430 F.2d 446, 457 (5th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971)("the acts of a union agent committed within the scope of his general authority is binding upon the union regardless of whether it was specifically authorized or ratified"; "since the International and the Local were acting in concert, they are responsible for the conduct, not only of their own agents, but of each other's agents") (affirming judgment against local and international union); *Allen v. International Alliance of Theatrical, Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO*, 338 F.2d 309, 317-19 (5th Cir. 1964)("[e]ven if the International should not be considered as a participant with Local 506 in the unlawful interference with Allen's employment, the International is liable for the acts of the Local under the doctrine of respondeat superior") (reversing district court holding that international union was not liable for acts of local union); *White Oak Coal Co.*

v. United Mine Workers of America, 318 F.2d 591, 598 (6th Cir. 1963), *cert. denied*, 375 U.S. 966 (1964)("actual authorization of specific acts was unnecessary") (affirming judgment against national union).

In *Dowd v. Int'l Longshoremen's Assn., AFL-CIO*, 975 F.2d 779, 785 (11th Cir. 1992), a secondary boycott case affirming an injunction against an American union which had allegedly violated the National Labor Relations Act by inducing Japanese unions to pressure importers not to import certain items, the court references "the liberal application of agency concepts appropriate in the labor context" and specifically notes that in labor cases *an agency or joint venture relationship may exist even where some of the elements required in an ordinary tort or contract dispute are absent. Id.* at 91 (emphasis added).[6]

Further, the *Dowd* court's citation to *Cagle's Inc. v. NLRB*, 588 F.2d 943, 947-48 (5th Cir. 1979) (where employer encouraged Chamber of Commerce director to campaign against formation of union and failed to effectively disavow such interference, employer was responsible for director's conduct even though director was not employer's formal agent); and *Star Kist Samoa Inc.*, 237 N.L.R.B. 238 (1978) (employer was responsible for anti-union activities of community organization, even where it had no right to demand or control the actions of

---

[6]In fact, the liability of an international union has been recognized by the Ninth Circuit in remedy for breaches of contractual responsibilities delegated to its local union. In *NLRB v. Int'l Longshoremen's and Warehousemen's Union*, 210 F.2d 581, 584-85 (9th Cir. 1954), the court enforced a Board order that an international union was responsible for the unfair labor practices of a local union under "a general principle of agency law."

the community organization).

Even an international union's mere awareness of the conduct and failure to repudiate an agent's acts may create responsibility. *Dowd*, 975 F.2d at 785 n.4, *citing Soft Drink Workers Union, Local No. 812*, 304 NLRB No. 22 (1991) (where union was aware of unfair labor practices by member on behalf of union and failed to repudiate conduct, union was responsible for member's actions); and *Service Employees Union, Local No. 87*, 291 NLRB 82 (1988) (picketers acted as agents of union, based upon union's apparent endorsement and ratification, even absent evidence that union actually initiated or endorsed picketing); *see also Alexander v. Local 496, Laborers' Int'l Union of North America*, 177 F.3d 394, 409 (6th Cir. 1999), *cert. denied*, 528 U.S. 1154 (2000) ("where an agency relationship exists, international unions are not only vicariously liable, they have an affirmative duty to oppose the local's discriminatory conduct"); *Myers v. Gilman Paper Corp.*, 544 F. 2d 837, 851 (5th Cir. 1977), *reh'g denied*, 556 F.2d 758 (5th Cir. 1977), *cert. dismissed, Local 741, Int'l Brotherhood of Electrical Workers, AFL-CIO v. Myers*, 434 U.S. 801 (1977) (international union is liable for a local union's discrimination where a "sufficient connection" exists between the two).

The liability of a parent national union has been upheld specifically with respect to the acts of a local union during bargaining. In *Riverton Coal Co. v. UMWA*, 453 F.2d 1035, 1042 (6th Cir. 1972), *cert. denied*, 407 U.S. 915 (1972), the court, remanding for entry of judgment in favor of plaintiff corporations against a national union, states that the,

> UMW, having the power to correct the unlawful action of the local union, and deciding to accept the benefit of it instead of taking appropriate action to halt the strike as it was required to do under the contract, thereby induced and encouraged both the 1964 and the 1966 strike.

Similarly, in *Sheet Metal Workers' Int'l Assn., AFL-CIO v. NLRB*, 293 F.2d 141, 149 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 896 (1961), the court enforced a Board order that an international union was responsible for the unfair labor practices of local unions, including the requirement of certain provisions in collective bargaining agreements. The acts creating liability need not be great. In *Int'l Bhd. of Electrical Workers, AFL-CIO v. NLRB*, 487 F.2d 1113, 1128 (D.C. Cir. 1972), the court affirmed the Board's conclusion that an international union had committed unfair labor practices merely by its routine disposition of an appeal and retention of records regarding a local union's disciplinary actions.

And, the policy favoring liability is so strong that

> where a union affirms prior conduct performed on its behalf, the union may be responsible for the unfair labor practices of another even where the conduct did not bind the union at the time it occurred.

Dowd, 975 F.2d at 786, *citing Service Employees Union, Local No. 87*, 291 NLRB 82 (1988); and *Sheet Metal Workers Union, Local No.2*, 203 NLRB 954, 956 (1973).

All of this, of course, is merely a specific application of the general rule that third parties may not disrupt labor relationships. *See NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 689 (1951) ("[i]t was an object of the strike to force the contractor to terminate Gould & Preisner's subcontract") (reversing judgment which had set aside Board order against trades council); *Wells v. Int'l Union of Op. Engrs, Local 181*, 303 F.2d 73, 75 (6th Cir. 1962) ("defendants' activities were secondary in nature and were engaged in for the purpose of inducing the Transit-Mix employees not to deliver concrete to the Tye & Wells job site and, therefore, in turn to force Tye & Wells to breach its contract with the United Construction Workers") (affirming judgment against unions for secondary boycott). Yet the court of appeals has effectively endorsed IBT's disruption in this case, contrary to the purpose of §301(a).

The federal courts at the very least should possess the power to enjoin acts by third parties under Section 301 that interfere with the Congressional interest, just as it permitted the injunction in *Boys Market*.

CONCLUSION

Wherefore, the Center on National Labor Policy Inc. and the National Association of Manufacturers respectfully requests this Court reverse the decision of the United States Court of Appeal for the Ninth Circuit.

Respectfully submitted,

MICHAEL E. AVAKIAN*
CENTER ON NATIONAL
NATIONAL POLICY, INC.
5211 Port Royal Rd., Suite 610
North Springfield, VA 22151
(703) 321-9180
*Counsel of Record for *Amici*

Dated: September 3, 2009

OF COUNSEL:
Quentin Riegel
NATIONAL ASSN. OF
MANUFACTURERS
1331 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 637-3000

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
SEP 3 2009
OFFICE OF THE CLERK

12

No. 08-1214

In the Supreme Court of the United States

GRANITE ROCK COMPANY,

Petitioner,

v.

THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS & TEAMSTERS LOCAL 287

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ROBIN S. CONRAD
SHANE BRENNAN KAWKA
AMAR D. SARWAL
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

ANDREW J. PINCUS
Counsel of Record
EVAN M. TAGER
ARCHIS A. PARASHARAMI
MELANIE W. RUGHANI
Mayer Brown LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

BOTH 507AOT

TABLE OF CONTENTS

Page

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 6

A. The Court Rather Than An Arbitrator Must Decide Whether The Parties To A Dispute Have Entered Into An Arbitration Agreement. 6

1. This Court's decisions in *Prima Paint* and *Buckeye* left open who decides questions of contract formation 6

2. This Court has held that a court must decide "questions of arbitrability" unless the parties have expressed a clear intention to submit such questions to an arbitrator. 11

3. Courts should resolve challenges to the formation of an arbitration agreement and to contracts in which an arbitration clause is contained. 13

B. The Ninth Circuit's Decision Is Contrary To These Established Principles. 19

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

CASES

14 Penn Plaza, LLC v. *Pyett*,
129 S. Ct. 1456 (2009) 1

Adams v. *Suozzi*, 433 F.3d 220 (2d Cir. 2005) 16

Arthur Andersen LLP v. *Carlisle*,
129 S. Ct. 1896 (2009) 1

AT&T Techs., Inc. v. *Commc'ns Workers*,
475 U.S. 643 (1986) ..... *passim*

Blossom v. *Milwaukee & Chicago R.R.*,
70 U.S. 196 (1866) 27

Boys Mkts., Inc. v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970) 21, 25, 27

Buckeye Check Cashing, Inc. v. *Cardegna*,
546 U.S. 440 (2006) ..... *passim*

Cancanon v. *Smith Barney, Harris, Upham & Co.*, 805 F.2d 998 (11th Cir. 1986) 17

Chastain v. *Robinson-Humphrey Co.*,
957 F.2d 851 (11th Cir. 1992) 15

Circuit City Stores, Inc. v. *Adams*,
532 U.S. 105 (2001) 2

First Options of Chicago, Inc. v. *Kaplan*,
514 U.S. 938 (1995) ..... *passim*

Gilmer v. *Interstate/Johnson Lane Corp.*,
500 U.S. 20 (1991) 21

Green Tree Financial Corp. v. *Bazzle*,
539 U.S. 444 (2003) 2

Howsam v. *Dean Witter Reynolds, Inc.*,
537 U.S. 79 (2002) 3, 12, 13, 14

I.S. Joseph Co. v. *Mich. Sugar Co.*,
803 F.2d 396 (8th Cir. 1986) 17

TABLE OF AUTHORITIES—continued

Page(s)

John Wiley & Sons, Inc. v. *Livingston*, 376 U.S. 543 (1964) 19, 27

Large v. *Conseco Fin. Servicing Corp.*, 292 F.3d 49 (1st Cir. 2002) 16

Microchip Tech. Inc. v. *U.S. Philips Corp.*, 367 F.3d 1350 (Fed. Cir. 2004) 17

Moses H. Cone Mem'l Hosp. v. *Mercury Constr. Corp.*, 460 U.S. 1 (1983) 3, 14

Preston v. *Ferrer*, 128 S. Ct. 978 (2008) 2

Prima Paint Corp. v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) ..... *passim*

Sandvik AB v. *Advent Int'l Corp.*, 220 F.3d 99 (3d Cir. 2000) 16

Sanford v. *Memberworks, Inc.*, 483 F.3d 956 (9th Cir. 2007) 18

Seawright v. *Am. Gen. Fin. Servs., Inc.*, 507 F.3d 967 (6th Cir. 2007) 17

Spahr v. *Secco*, 330 F.3d 1266 (10th Cir. 2003) 17

Specht v. *Netscape Commc'ns Corp.*, 306 F.3d 17 (2d Cir. 2002) 16

Sphere Drake Ins. Ltd. v. *All Am. Ins. Co.*, 256 F.3d 587 (7th Cir. 2001) 17, 19

Three Valleys Mun. Water Dist. v. *E.F. Hutton & Co.*, 925 F.2d 1136 (9th Cir. 1991) 17, 23

United Steelworkers v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) 4, 25

Vaden v. *Discover Bank*, 129 S. Ct. 1262 (2009) 2

Will-Drill Res., Inc. v. *Samson Res. Co.*, 352 F.3d 211 (5th Cir. 2003) 16

TABLE OF AUTHORITIES—continued

Page(s)

STATUTES

9 U.S.C. §§ 1-16 2
9 U.S.C. § 4 ..... 7, 14, 22, 24
29 U.S.C. § 185(a) 20

OTHER AUTHORITIES

Richard A. Lord, 20 Williston on Contracts § 56:66 (4th ed. 2009) 21
RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981) 27

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation, representing an underlying membership of more than 3 million businesses and organizations of all sizes. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus* briefs in numerous cases that have raised issues of vital concern to the nation's business community.

The Chamber has regularly participated as *amicus curiae* in cases before this Court addressing arbitration issues, including, most recently, *Arthur Andersen LLP* v. *Carlisle*, 129 S. Ct. 1896 (2009); *14 Penn Plaza, LLC* v. *Pyett*, 129 S. Ct. 1456 (2009); *Vaden* v. *Discover Bank*, 129 S. Ct. 1262 (2009);

---

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus*, its members, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters reflecting the parties' consent to the filing of this *amicus* brief have been filed with the Clerk's office.

Preston v. *Ferrer*, 128 S. Ct. 978 (2008); *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440 (2006); *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003); and *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105 (2001).

Many members of the Chamber have found that arbitration allows them to resolve disputes promptly and efficiently, while avoiding the costs associated with traditional litigation. Accordingly, these businesses routinely include arbitration provisions as standard features of their business contracts, including collective bargaining agreements. For this reason, the Chamber has a strong interest in ensuring that the federal law of arbitration is appropriately applied and that businesses can rely upon stable arbitration precedent.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Three years ago in *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440 (2006), this Court held that, when a party challenges the validity of an entire contract that contains an arbitration provision, the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, requires that the party present those arguments to an arbitrator rather than a court. This case presents a question that *Buckeye* left open: whether a party to an alleged collective bargaining agreement that disputes the very *existence* of the agreement (including its arbitration clause) must similarly challenge the existence of the contract (including the arbitration agreement) before an arbitrator.

---

[2] In this *amicus* brief, the Chamber addresses only the first question presented by this case.

The Chamber strongly supports the use of arbitration agreements. This Court's precedents establish that parties to a contract may agree to refer to an arbitrator virtually all questions concerning the arbitrability of a dispute—including the scope and validity of an arbitration agreement. But there is a narrow exception to this principle: When a party challenges the very existence of an arbitration agreement (or of a contract containing an arbitration clause), a court rather than an arbitrator must resolve that challenge.

1. Over eight decades ago, Congress enacted the FAA to ensure that private agreements to arbitrate are given effect and are not thwarted by judicial hostility to arbitration. *Buckeye*, 546 U.S. at 444. This Court therefore "has also long recognized and enforced a 'liberal federal policy favoring arbitration agreements.'" *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quoting *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

In furtherance of that policy, this Court applies a "presumption of arbitrability" when a contract contains an arbitration clause: a motion to compel arbitration should not be denied "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Techs., Inc.* v. *Commc'ns Workers*, 475 U.S. 643, 650 (1986). Particularly when labor disputes are at issue, this presumption of arbitrability "recognizes the greater institutional competence of arbitrators in interpreting collective-bargaining agreements," "furthers the national labor policy of peaceful resolution of labor disputes," and "best accords with the parties' presumed objectives in

pursuing collective bargaining." *Id.* (internal quotation marks omitted).

At the same time, this Court has recognized that arbitration agreements are founded on the consent of the parties. Arbitrators have authority to resolve disputes only when the parties have agreed to that mode of dispute resolution. See, *e.g.*, *AT&T Techs.*, 475 U.S. at 648-649. Before compelling parties to arbitrate their dispute, therefore, a court must be satisfied that the parties have actually entered into an agreement to arbitrate. *Id.* As this Court explained nearly fifty years ago, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

2. The Court has grappled with these principles in two independent lines of precedent: *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), and *Buckeye*, 546 U.S. 440, on the one hand, and *AT&T Technologies*, 475 U.S. 643, and *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938 (1995), on the other. Each of these cases considered the threshold question of who—a court or an arbitrator—should resolve particular categories of issues when the parties' contract contains an arbitration clause.

Prima Paint and *Buckeye* held that, in order to ensure that the parties' intent to arbitrate is given full effect, a broad challenge to the enforceability of a contract containing an arbitration clause is presumptively a question for the arbitrator, while challenges that are specific to the validity of the arbitration clause itself generally are for the court. *AT&T Technologies* and *First Options* addressed *who* should de-

cide whether a particular dispute is subject to arbitration—so-called "questions of arbitrability"—holding that such questions are presumptively for a court, unless the parties have clearly and unmistakably agreed otherwise.

The first question presented in this case lies at the intersection of these two lines of precedent: When a putative contract contains an arbitration clause, should a court or an arbitrator decide a challenge to the *formation* of that agreement—*i.e.*, a challenge to the contract's very existence?

Citing *Prima Paint* and *Buckeye*, the Ninth Circuit held that, in the circumstances presented by this case, such a dispute could be decided by an arbitrator because the challenge related to the formation of the entire contract rather than the arbitration clause itself. As petitioner has demonstrated, however, every other Court of Appeals to have considered this issue has held that questions of contract formation go to the heart of whether the parties have in fact consented to arbitrate their dispute, and that such issues of consent to arbitrate must be resolved by the court in the first instance.

The majority rule accords with this Court's precedent, federal arbitration law, and common sense. Under the FAA, an arbitrator's power to resolve any dispute requires the consent of the parties. It would be hopelessly circular to vest an arbitrator with the power to decide whether he or she has the power to decide a dispute. Thus, when (as here) the question is whether the parties assented to a contract containing an arbitration clause, that issue is necessarily the domain of the court.

The first question presented here is therefore both narrow and simple to resolve. This Court should bring the Ninth Circuit in line with this Court's prior precedent, as well as the decisions of every other federal court of appeals, and hold that—regardless of which party resists arbitration—threshold disputes about whether the parties entered into a contract containing an arbitration clause may not be referred to an arbitrator on the basis of that disputed contract.

ARGUMENT

A. The Court Rather Than An Arbitrator Must Decide Whether The Parties To A Dispute Have Entered Into An Arbitration Agreement.

1. This Court's decisions in Prima Paint *and* Buckeye *left open who decides questions of contract formation.*

a. *Prima Paint* and *Buckeye* conclusively establish that, under the FAA, challenges to the enforceability of an entire contract containing an arbitration clause—on grounds such as fraud and violation of public policy—are decided by an arbitrator. But the Court left unanswered in those decisions the question whether an arbitrator may decide a claim that the parties never consented to a contract containing an arbitration clause—for example, on grounds of lack of assent, physical duress, or capacity to enter into a contract.

In *Prima Paint*, the underlying lawsuit involved a claim by Prima Paint for rescission of a contract under which it had purchased a paint manufacturing business from Flood & Conklin ("F&C"). Prima

Paint alleged that F&C had fraudulently induced it to enter into the contract by misrepresenting F&C's solvency—pointing out that F&C had filed for bankruptcy within a week of executing the contract. F&C sought to compel arbitration under the arbitration clause contained in the parties' contract. 388 U.S. at 399.

This Court held that, when a party seeks to invalidate a contract containing an arbitration clause on the ground that the entire contract was fraudulently induced, the dispute is for an arbitrator rather than a court to decide. *Prima Paint*, 388 U.S. at 403-404. As this Court explained, Section 4 of the FAA requires a federal court to order arbitration once it is "satisfied that 'the *making* of the agreement for arbitration * * * is not in issue.'" *Id.* at 403 (quoting 9 U.S.C. § 4) (emphasis added). Concluding that agreements to arbitrate are "separable" from the larger contracts within which they are embedded (*id.* at 402)—the so-called "separability" doctrine—this Court held that a claim of fraud relating specifically to the arbitration clause itself—"an issue which goes to the 'making' of the agreement to arbitrate"—may be decided by a court, but that "claims of fraud in the inducement of contracts generally," which do not necessarily implicate the "making" of the arbitration agreement, are reserved for the arbitrator. *Id.* at 403-404.

The Court's holding in *Prima Paint* flowed naturally from the basic principles of consent underlying the FAA. Prima Paint did not dispute that it had entered into an agreement with F&C. It simply contended that, had it known of F&C's impending bankruptcy, it would not have entered into that agreement. Although the ultimate enforceability of the

entire contract for sale was therefore under challenge, there was no question that the parties had in fact entered into an agreement and that both parties had consented to submit their disputes under that contract for determination by an arbitrator. Consistent with the well-established federal policy of promoting and enforcing arbitration agreements, the Court held that, so long as the making of an arbitration agreement was not in dispute, the agreement to arbitrate must be enforced notwithstanding a challenge to the enforceability of the contract as a whole.

b. Nearly four decades after *Prima Paint*, this Court again addressed the separability doctrine in *Buckeye*. Buckeye involved so-called "payday lending" agreements (also known as "deferred-payment transactions") under which consumers would receive cash in exchange for a post-dated personal check for the loaned amount plus a finance charge. For each such transaction, the parties signed a written agreement that contained, among other terms, an arbitration clause. Cardegna filed suit against Buckeye in Florida state court, alleging that the finance charges associated with the transactions constituted usurious interest rates that were illegal under Florida law.

Buckeye sought to compel arbitration under the parties' agreements, but Cardegna resisted, arguing, among other things, that because (in his view) the interest rates were usurious, the payday lending agreements—including the arbitration clause—were illegal and therefore void in their entirety. *Id.* at 443.

This Court disagreed, holding that, because the parties had unquestionably consented to arbitrate their disputes under the contract, and the consum-

ers' contention that the contract was void went to the validity of the contract in its entirety rather than the arbitration clause in particular, the question of the contract's legality should be decided by an arbitrator in the first instance. *Id.* at 444-446.

Amplifying the principle recognized in *Prima Paint*, this Court distinguished between two types of challenges to the "validity of arbitration agreements": (1) *specific* challenges to the "validity of the agreement to arbitrate"; and (2) *general* challenges to the validity of "the contract as a whole." *Buckeye*, 546 U.S. at 444. In the Court's view, the consumers' challenge was of the second type: "The crux of the complaint is that the contract as a whole * * * is rendered invalid by the usurious finance charge." *Id.* Therefore, under *Prima Paint*'s separability doctrine, "because respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract." *Id.* at 446.

As in *Prima Paint*, there was no dispute in *Buckeye* that the parties had formed an agreement. Instead, the parties disagreed about the validity of the agreement as a whole on public policy grounds. The *Buckeye* Court recognized the "conundrum" that, although "the *Prima Paint* rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void," it is "equally true" that the contrary approach "permits a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable." 546 U.S. at 448-449. Applying the "federal substantive law" of arbitrability (*id.* at 447), this Court explained, "*Prima Paint* resolved this conundrum—and resolved it in favor of the separate enforceability of

arbitration provisions" (*id.* at 449). Therefore, the Court reaffirmed *Prima Paint*'s conclusion that "a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Id.*

The holding in *Buckeye* is fully consistent with the well-established federal policy favoring arbitration. The respondent in *Buckeye* sought to have the state court decide whether the finance charge imposed by the contract was usurious as a precondition to enforcing the arbitration agreement. In the process, however, the court would have decided the merits of the very issue that the parties had agreed to arbitrate. As this Court has repeatedly cautioned, courts must not be permitted to usurp the authority of the arbitrator by resolving questions that the parties intended for an arbitrator to decide. See *AT&T Techs.*, 475 U.S. at 649-650 ("[A] court is not to rule on the potential merits of the underlying claims. * * * The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.") (internal quotation marks omitted).

In reaching its holding in *Buckeye*, however, this Court was careful to note that challenges to an entire contract's *validity* should not be confused with general challenges to a contract's *existence*. In a footnote, the Court reserved judgment on the latter question:

> The issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded. Our opinion today addresses only the former, and does not speak to the issue decided in the cases cited by respondents * * * which hold that it is for the courts to de-

> cide whether the alleged obligor ever signed the contract * * *, whether the signor lacked authority to commit the alleged principal * * *, and whether the signor lacked the mental capacity to assent * * *.

546 U.S. at 444 n.1.

2. This Court has held that a court must decide "questions of arbitrability" unless the parties have expressed a clear intention to submit such questions to an arbitrator.

A separate line of this Court's precedent provides additional guidance on the question left open in *Prima Paint* and *Buckeye*. In *AT&T Technologies*, the Court held that parties to a contract may agree to arbitrate virtually any "questions of arbitrability," so long as their intent to do so is "clear[] and unmistakabl[e]." 475 U.S. at 649. But a court will decide such questions in the absence of an express agreement to arbitrate questions of arbitrability. *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 945 (1995); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002).

a. *AT&T Technologies* addressed who—a court or an arbitrator—decides whether a particular dispute is within the scope of the parties' arbitration agreement.

The collective-bargaining agreement at issue in that case required arbitration of certain—but not all—employment-based grievances. *AT&T Techs.*, 475 U.S. at 645. The union sought to compel arbitration of its grievance that AT&T had laid off a number of workers. *Id.* at 646.

Because arbitrators derive their authority solely from the parties' agreement, the Court explained that basic "question[s] of arbitrability"—including "whether a collective-bargaining agreement creates a duty for the parties to arbitrate the *particular* grievance"—are issues for judicial determination unless the contracting parties "clearly and unmistakably provide otherwise." *Id.* at 649 (emphasis added). Without such an express agreement, the Court held, "the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *Id.*

b. The Court expanded upon this principle in *First Options*, which also involved a "question of arbitrability." Specifically, a married couple—one of whom owned an investment company that had agreed to arbitrate its disputes with a stock-clearing firm—resisted arbitration on the ground that they had not personally signed a contract containing an arbitration clause. 514 U.S. at 940-941.

The Court noted that the threshold question of "who—court or arbitrator—has the primary authority to decide whether a party has agreed to arbitrate" was "fairly simple." *Id.* at 942-943. "Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." *Id.* at 943 (citations omitted). Although ordinarily a presumption in favor of arbitration applies when analyzing whether parties agreed to arbitrate a given dispute (see *id.* at 944-945), with respect to questions of arbitrability, the presumption is reversed and may be overcome only when there is "clear and unmistakable evidence" of

the parties' intent to arbitrate such questions. *Id.* at 944-945 (alterations and internal quotation marks omitted).

This narrow exception to the usual presumption in favor of arbitration was appropriate because contracting parties are unlikely to contemplate "the significance of having arbitrators [rather than a court] decide the scope of their own powers," and the FAA does not "force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *Id.* at 945. See also *Howsam*, 537 U.S. at 83 ("Although the Court has also long recognized and enforced a 'liberal federal policy favoring arbitration agreements,' * * * it has made clear that there is an exception to this policy: The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the '*question of arbitrability*,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'") (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25, and *AT&T Techs.*, 475 U.S. at 649).

3. Courts should resolve challenges to the formation of an arbitration agreement and to contracts in which an arbitration clause is contained.

As this Court's precedents make clear, most questions of arbitrability can be resolved by an arbitrator when the parties to a contract agree to do so. There is, however, one fundamental "gateway" question of arbitrability (*Howsam*, 537 U.S. at 83-84) that generally cannot be determined by an arbitrator: Whether the parties to a dispute in fact formed a putative contract containing an arbitration clause.

a. Consider, for example, a case in which party A seeks to compel arbitration based on an arbitration clause contained in a contract allegedly signed by party B. Party B resists arbitration—and enforcement of the contract in general—on the ground that her signature has been forged. In response, Party A asserts that party B's signature is genuine, but that in any event the dispute over whether the signature has been forged should be decided by an arbitrator under the arbitration clause in the putative contract.

Such a dispute, which directly places the "making of the agreement for arbitration * * * in issue" (9 U.S.C. § 4), surely must be resolved by a court. As the Eleventh Circuit has explained, when a party claims that her signature was forged, she is "challenging the very existence of *any* agreement, *including the existence of an agreement to arbitrate.*" *Chastain* v. *Robinson-Humphrey Co.*, 957 F.2d 851, 854 (11th Cir. 1992) (emphasis in original). In that "unusual case," "there is no presumptively valid general contract which would trigger the district court's duty to compel arbitration pursuant to the [FAA]." *Id.* at 852-854.

Indeed, even if the contract contains broad language expressly reserving to the arbitrator the power to resolve questions of contract formation, it would seem extraordinarily difficult for a court to conclude that (under *First Options* and *Howsam*) the parties clearly and unmistakably evidenced an intention to have the arbitrator resolve whether a party's signature on the contract was forged. After all, one of the parties is challenging the validity of his very assent

to that contract, including the language that would authorize an arbitrator to proceed.[3]

b. The Courts of Appeals have concluded with near uniformity that questions of contract formation must be decided by a court rather than an arbitrator. See, *e.g.*, *Large* v. *Conseco Fin. Servicing Corp.*, 292 F.3d 49, 53 (1st Cir. 2002) (holding that the *Prima Paint* doctrine of separability does not apply to cases involving "allegations that the contract with the arbitration clause *never* existed") (emphasis in origi-

---

[3] During the *Buckeye* oral argument, the Chief Justice questioned Buckeye's counsel about a similar example involving a challenge to the formation of the contract on the basis of alleged physical duress:

> [The Chief Justice]: [Y]ou concede, though, that if * * * the challenge to the underlying contract implicates the arbitration clause as well, that that is for the court and not the arbitrator. * * * In other words * * * you put a gun to the person's head and say, sign this contract, and the person does. It contains an arbitration clause. They don't have to go to arbitration to challenge that.
>
> [Counsel]: [W]e concede that there is [an] asterisk, as we put it in our brief, to the otherwise bright line rule set down in *Prima Paint*, that rule being if you're challenging the underlying contract, you have to go to arbitration, precisely along the lines that Your Honor identified where the challenge to the underlying contract involves the parties' assents to the underlying contract, that challenge necessarily challenges your assent to arbitration. And given that the whole premise of arbitration in the first place is that it's a matter of consent, we would say that that particular challenge, as the lower courts have recognized since *Prima Paint*, an assent-based challenge to the underlying contract, is * * * an exception or an asterisk to the otherwise brightline rule.

Transcript of Oral Argument at *4-*5, *Buckeye Check Cashing, Inc.* v. *Cardenga*, 546 U.S. 440 (2006), available at 2005 WL 3370429 (Nov. 29, 2005).

nal); *Adams* v. *Suozzi*, 433 F.3d 220, 226 (2d Cir. 2005) (concluding that the court "possessed not only authority, but a duty, to determine whether there ever existed an agreement to arbitrate between the parties"); *Specht* v. *Netscape Commc'ns Corp.*, 306 F.3d 17, 26 (2d Cir. 2002) (finding it "well settled that a court may not compel arbitration until it has resolved 'the question of the very existence of the contract embodying the arbitration clause'"); *Sandvik AB* v. *Advent Int'l Corp.*, 220 F.3d 99, 100-101 (3d Cir. 2000) (refusing to compel arbitration when a party asserted that "the agent who signed the agreement on its behalf lacked authority to do so"); *Will-Drill Res., Inc.* v. *Samson Res. Co.*, 352 F.3d 211, 215 (5th Cir. 2003) (holding that the doctrine of separability does not apply to challenges to contract formation because "[w]here no contract exists, there is no agreement on anything, including an agreement to arbitrate"); *Seawright* v. *Am. Gen. Fin. Servs., Inc.*, 507 F.3d 967, 972 (6th Cir. 2007) (concluding that the "underlying question" of whether parties assented to the contract containing an arbitration clause "is to be 'decided by the court, not the arbitrator'"); *Sphere Drake Ins. Ltd.* v. *All Am. Ins. Co.*, 256 F.3d 587, 591 (7th Cir. 2001) ("[A] person who has not consented (or authorized an agent to do so on his behalf) can't be packed off to a private forum. * * * [T]he parties *do* control the existence and limits of an arbitrator's power. No contract, no power."); *I.S. Joseph Co.* v. *Mich. Sugar Co.*, 803 F.2d 396, 399 (8th Cir. 1986) ("If there is in fact a dispute as to whether an agreement to arbitrate exists, then that issue must first be determined by the court as a prerequisite to the arbitrator's taking jurisdiction."); *Spahr* v. *Secco*, 330 F.3d 1266, 1272 (10th Cir. 2003) (holding that "the rule announced in *Prima Paint*

does not extend to a case where a party challenges a contract on the basis that the party lacked the mental capacity to enter into a contract"); *Cancanon* v. *Smith Barney, Harris, Upham & Co.*, 805 F.2d 998, 1000 (11th Cir. 1986) (per curiam) (holding that, "where the allegation is one of * * * ineffective assent to the contract, the issue [of arbitrability] is not subject to resolution pursuant to an arbitration clause contained in the contract documents"); *Microchip Tech. Inc.* v. *U.S. Philips Corp.*, 367 F.3d 1350, 1358 (Fed. Cir. 2004) (concluding that "the responsibility of the judiciary to resolve the gateway dispute of whether an agreement to arbitrate exists is not limited to situations in which there is an independent challenge to the arbitration clause").

Indeed, even other panels of the Ninth Circuit have read *Prima Paint* and its progeny as being "limited to challenges seeking to *avoid* or *rescind* a contract—not to challenges going to the very existence of a contract that a party claims never to have agreed to." *Three Valleys Mun. Water Dist.* v. *E.F. Hutton & Co.*, 925 F.2d 1136, 1140 (9th Cir. 1991) (emphasis in original). In the view of these panels, "[o]nly a court" can decide "the threshold issue of the *existence* of an agreement to arbitrate." *Id.* at 1140-1141 (emphasis in original); see also *Sanford* v. *Memberworks, Inc.*, 483 F.3d 956, 962 (9th Cir. 2007) ("Issues regarding the *validity* or *enforcement* of a putative contract mandating arbitration should be referred to an arbitrator, but challenges to the *existence* of a contract as a whole must be determined by the court prior to ordering arbitration.") (emphasis in original).

Judge Easterbrook, writing for the Seventh Circuit in a case decided before this Court's ruling in *Buckeye*, noted that "*Prima Paint* sits uneasily

alongside *AT&T Technologies* and *First Options*." *Sphere Drake*, 256 F.3d at 590. Nevertheless, he found the answer to the question presented by this case straightforward, explaining:

> A person whose signature was forged has never agreed to anything. Likewise with a person whose name was written on a contract by a faithless agent who lacked authority to make that commitment. This is not a defense to enforcement, as in *Prima Paint*; it is a situation in which no contract came into being; and as arbitration depends on a valid contract, an argument that the contract does not exist can't logically be resolved by the arbitrator (unless the parties agree to arbitrate this issue after the dispute arises).

Id. at 590-591.

In short, because arbitration is at bottom a matter of contract, a court cannot compel arbitration under a contract unless it first determines that the contract in fact *exists*.[4] Although this Court's settled precedent properly holds that parties may agree to submit virtually any issue—including questions of arbitrability—to an arbitrator, a challenge to the formation of an arbitration agreement presents a narrow exception to the rule. When a party challenges its very assent to a contract containing an arbitration clause, that dispute over contract formation

---

[4] Cf. *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 546-547 (1964) (because "[t]he duty to arbitrate [is] of contractual origin," there can be "no doubt" that "a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty").

simply cannot be decided by the arbitrator in the first instance.

B. The Ninth Circuit's Decision Is Contrary To These Established Principles.

The Ninth Circuit failed to apply these principles in holding that petitioner Granite Rock and respondent Local 287 are required to arbitrate over whether the parties assented to a collective bargaining agreement (and to the arbitration clause contained in that agreement).

1. There is no dispute that, in the midst of an ongoing labor strike, Granite Rock and the leadership of Local 287 reached a "tentative" collective-bargaining agreement ("CBA") that contained, among other terms, a "no-strike" provision and a clause requiring arbitration of "all disputes arising under this agreement." The CBA was to take effect as soon as it was ratified by union members. J.A. 45-47.

The crux of the parties' dispute centers on what happened the morning after the company and union leadership reached the tentative CBA. Granite Rock contends that the union members convened, voted to accept the agreement, ended their strike, and prepared to return to work. J.A. 345. Local 287, on the other hand, submits that the union members never ratified the agreement, and that it accordingly never went into force. J.A. 346.

Whether or not the CBA in fact was ratified, however, the union soon thereafter resumed the strike. Granite Rock, contending that the strike violated the CBA, filed suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), requesting a so-called "*Boys Markets* injunc-

tion" (J.A. 46), an important mechanism by which an employer may request that the court enjoin a strike in order to facilitate resolution of the parties' labor disputes through arbitration. See *Boys Mkts., Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235, 241 (1970).[5]

In resisting the injunction, the union asserted that its members had never ratified the tentative agreement, and that the CBA—which would have obligated the union to resolve its dispute through arbitration rather than by striking—therefore had never come into effect. Nevertheless, after the strike ended, the union moved to compel arbitration of Granite Rock's claims on the ground that the agree-

---

[5] Employers commonly seek "*Boys Markets*" injunctions to enforce anti-strike provisions of collective bargaining agreements, allowing arbitration of the underlying labor disputes to proceed without a strike looming over efforts at conciliation. As this Court explained in *Boys Markets*, "the very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes, lockouts, or other self-help measures"—an important goal that would be "largely undercut" without an "immediate, effective remedy for those very tactics that arbitration is designed to obviate." 398 U.S. at 249.

We note that, just over two decades after *Boys Markets*, this Court made clear that an arbitrator has the authority to provide injunctive and other equitable relief. *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991). Arguably, then, Granite Rock and other employers could seek to compel a union to arbitrate and direct requests for injunctive relief to the arbitrator. Nevertheless—particularly given the emergency conditions that a strike can create—the *Boys Markets* injunction remains a frequently-used judicial mechanism to facilitate the process of labor arbitration. See, *e.g.*, Richard A. Lord, 20 Williston on Contracts § 56:66 (4th ed. 2009).

ment (alleged not to exist by Local 287) committed the parties' disputes to arbitration. J.A. 346-347.

Noting the paradox of the union's attempt to "avail itself of arbitration while at the same time insisting that the agreement was never ratified," the district court ordered a jury trial, limited to the threshold question of whether the parties had entered into the CBA (including its arbitration clause). J.A. at 231, 359-61; see also 9 U.S.C. § 4 ("If the making of the arbitration agreement * * * be in issue, the court shall proceed summarily to the trial thereof. * * * Where such an issue is raised, the party alleged to be in default [of the arbitration agreement] may * * * demand a jury trial of such issue.").

After a unanimous jury found that the CBA had in fact been ratified, the district court ordered arbitration of the remaining issues, including Granite Rock's claims for breach of contract and damages. J.A. 381-382; see also 9 U.S.C. § 4 ("If the jury find[s] that an agreement for arbitration was made in writing * * *, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.").

The Ninth Circuit vacated the jury's determination that the parties had entered into the CBA (and thus the arbitration agreement), instead ordering the district court to compel arbitration of the dispute "in its entirety"—including the issue of whether the parties had formed the CBA. J.A. 61. In the Ninth Circuit's view, the separability doctrine set forth by this Court in *Prima Paint* and *Buckeye* generally requires that "challenges to an entire contract"—as opposed to "challenges to an arbitration clause" specifically—be considered by the arbitrator in the first instance. J.A. 56. Because neither party independently chal-

lenged the arbitration clause here, the court held that the formation dispute was committed to the arbitrator. J.A. 58-59.

The Ninth Circuit acknowledged its own prior decision to the contrary in *Three Valleys*, in which it held that "[o]nly a court" may resolve "the threshold issue of the *existence* of an agreement to arbitrate." 925 F.2d at 1140 (cited at J.A. 57). But it distinguished *Three Valleys* on the ground that here the party resisting arbitration (Granite Rock) was also the party suing to enforce the agreement that contained the arbitration clause. J.A. 58. The Ninth Circuit stated that a party implicitly "consent[s] to arbitration"—of, apparently, all conceivable issues—"by suing under [a] contract containing [an] arbitration clause." J.A. 60.

2. By converting the parties' litigation positions into an implied consent to arbitrate questions of contract formation, the court wrongly inferred, in effect, a post-dispute agreement to arbitrate between the parties.

Importantly, the Ninth Circuit did *not* hold that the parties through their litigating positions had conceded the CBA's validity. It might have been possible for the lower courts to conclude that Granite Rock's suit for a *Boys Market* injunction constituted a concession of the validity of the CBA and that Local 287's effort to compel arbitration similarly amounted to an acknowledgement that the CBA was valid. In that situation, with both parties impliedly conceding the validity of the contract, the question of contract formation would be resolved, and the parties' underlying disputes could properly be referred to arbitration.

Instead, however, the Ninth Circuit drew a very different inference—it implied the parties' consent to resolution by an arbitrator of the question of contract formation. That conclusion is plainly wrong.

a. The court of appeals relied in part on the arbitration clause contained in the CBA (the agreement whose existence Local 287 disputed), holding that the CBA could properly reflect an intent to refer to an arbitrator disputes over the formation of the CBA itself. The court asserted that the arbitration provision at issue was "broad enough to cover the disputes over contract formation," noting that "[a]rbitration clauses are to be construed very broadly" and that "[d]oubts should be resolved in favor of coverage." J.A. 58 & n.4.

That ruling is directly contrary to the principles of this Court's decisions, discussed above, which hold that the claim that a party did not assent to an agreement containing an arbitration clause always must be decided by a court. See Part A(3), *supra*. Thus, even assuming that the language of the arbitration clause could be read to encompass disputes over the formation of the CBA, the very nature of a challenge to a contract's formation precludes reliance on the language of the disputed contract to provide the necessary evidence of the parties' intent to arbitrate that issue. Because the "making" of the CBA is in question, and no separate post-dispute "written agreement for arbitration" exists, the district court could not compel arbitration under the FAA. See 9 U.S.C. § 4.

b. The court of appeals also erred in its evaluation of the effect of the parties' litigating positions. First, the Ninth Circuit failed to appreciate that Granite Rock's effort to enforce the CBA by seeking a

Boys Markets injunction was consistent with this Court's well-established labor law precedent, and did not constitute consent (implied or otherwise) to having an arbitrator decide the parties' dispute over the existence of a contract.

In *Boys Markets*, the Court expressly contemplated a situation such as the one presented here, in which a party goes to federal court to seek an injunction against a strike before arbitrating the underlying labor disputes. In such circumstances, it held, a court must resolve the question of contract formation before compelling arbitration of the remaining issues. 398 U.S. at 254; see also *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (noting that Congress has, "by [section] 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate").

Understood in view of the common *Boys Markets* procedure, therefore, Granite Rock's attempt to obtain an injunction to enforce the anti-strike provision in the CBA did not amount to a post-dispute agreement that an *arbitrator* should decide whether the CBA was formed.[6]

---

[6] After the district court denied Granite Rock's request for an injunction against the strike, Granite Rock pursued its lawsuit in court, contending that it had suffered damages because of respondent Local 287's strike, which had proceeded in violation of the CBA's no-strike provision. J.A. 229. The district court properly determined that it should resolve only whether the parties had formed a CBA; once it did so (by conducting a jury trial on the disputed factual issues), it properly referred the remaining breach and damages claims to arbitration. J.A. 381-382.

In assessing Local 287's litigation positions, the Ninth Circuit also failed to recognize that the union was attempting to have its cake and eat it, too. By seeking to compel arbitration, Local 287 was required to prove that an agreement to arbitrate existed—and it did so by relying upon the arbitration provision contained within the collective-bargaining agreement. In defending against Granite Rock's request for an injunction against its strike, however, Local 287 asserted that the tentative CBA never had been ratified and that the CBA—including the agreement to arbitrate—therefore did not exist.

Such a position is untenable. It would have been perfectly reasonable for the Ninth Circuit to hold that, because the local union had moved to compel arbitration under the arbitration clause in the CBA, the union had necessarily admitted that it had ratified the CBA and the arbitration clause it was seeking to enforce. But it was inappropriate for the court to determine that Local 287's arguments "in the alternative" (J.A. 59)—*i.e.*, that (i) Granite Rock is bound by the arbitration clause in the CBA but (ii) that the CBA was never formed—somehow authorized the arbitrator to determine the question of contract formation.

The Ninth Circuit dismissed these difficulties by noting that arbitration is a matter of consent, and asserting that here "both parties consented to arbitration; Granite Rock implicitly by suing under the contract containing the arbitration clause, and Local 287 explicitly by asserting the arbitration clause." J.A. 60. As we have discussed, however, while that conduct might have provided grounds for finding a concession of the contract's validity, it in no way pro-

vides a justification for allowing an arbitrator to resolve the question of contract formation.

Moreover, the Ninth Circuit's implication of a post-dispute arbitration agreement between the parties (divorced from the CBA itself) ignores that any consent to arbitration would have taken place here only if the underlying contract existed. Common sense suggests that Granite Rock would consent to arbitrate its disputes with the union *only if* the union in turn consented to the other terms of the collective-bargaining agreement. See, *e.g.*, *Boys Mkts.*, 398 U.S. at 248 (noting that a no-strike provision in a CBA "is the quid pro quo for an undertaking by the employer to submit grievance disputes to the process of arbitration"). It would be an odd notion of consent indeed if an employer's offer of a contract containing an arbitration provision, allegedly rejected by the offeree, nonetheless permanently bound the offeror to arbitrate. See, *e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981) ("the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration"); *Blossom* v. *Milwaukee & Chicago R.R.*, 70 U.S. 196, 205 (1866) (noting that "[u]naccepted offers to enter into a contract bind neither party" and that an offeror cannot be held to the terms of an offer not accepted by the offeree).

The court of appeals plainly erred in holding that an arbitrator could decide the contract formation issue. The question whether the parties assented to the CBA was an issue for resolution only by the district court.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBIN S. CONRAD
SHANE BRENNAN KAWKA
AMAR D. SARWAL
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

ANDREW J. PINCUS
Counsel of Record
EVAN M. TAGER
ARCHIS A. PARASHARAMI
MELANIE W. RUGHANI
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Amicus Curiae

SEPTEMBER 2009